CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC., PETITIONER,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,779

CIVIL.

D'OENCH, DUHME & CO., INC., A CORPORATION,
APPELLANT,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 5, 1940.

INDEX.

	Original	Print
Notice of Appeal	1	1
Docket Entry of filing of Notice of Appeal and mailing of copy to Counsel for Plaintiff	2	1
Bond on Appeal	3	2
Complaint	5	3
Plaintiff's Exhibit A, Promissory Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co. $5,000.00, January 1, 1933, Memorandum as to	6	4
Summons and Marshal's Return	8	4

	Original	Print
Answer	10	6
Reply filed; Motion of Defendant to strike Reply overruled; Cause submitted, November 20, 1939	15	9
Reply	16	10
Transcript of Testimony and Proceedings	18	11
Caption	18	11
Testimony for Plaintiff	19	12
Plaintiff's Exhibits	20	13
1, Promissory Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $5,000.00, January 1, 1933	21	13
2a and 2d, Application of Belleville Bank & Trust Co., to Federal Deposit Insurance Corporation for loan, April 2, 1938	24	15
3, Note executed by Belleville Bank & Trust Company to Federal Deposit Insurance Corporation, Memorandum as to	26	17
4, Page 0096 of Schedule B-7 relating to charged-off assets	28	18
5, Power of Attorney executed by Belleville Bank & Trust Co., to Federal Deposit Insurance Corporation, Memorandum as to	29	18
R. R. Banjan	29	19
W. J. Stapleton	52	33
Testimony for Defendant	55	35
Admission that Defendant is a corporation incorporated under laws of Missouri	55	35
Defendant's Exhibits	57	36
A, Receipt for Demand Note for $2,000.00, Belleville Bank & Trust Co., to D'Oench Duhme & Co., Inc	57	36
B, Receipt for Demand Note for $3,000.00, Belleville Bank & Trust Co., to D'Oench Duhme & Co., Inc	58	37
Louis H. Kreitmeyer	58	37
Herman Duhme	85	54
Further Testimony for Plaintiff	89	56
Plaintiff's Exhibit 6, Demand Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $3,000.00, August 1, 1926	90	57
Plaintiff's Exhibit 7, Demand Note, D'Oench Duhme & Co., Inc., to Belleville Bank & Trust Co., $2,000.00, August 1, 1926	90	59
R. R. Banjan	91	61
W. J. Stapleton	95	63
Docket entry of filing of Findings of Fact and Conclusions of Law and Decree	100	65
Findings of Fact and Conclusions of Law, etc	101	66
Decree, January 8, 1940	108	72
Docket entry of filing of Motion of Defendant for new Trial	109	72
Motion of Defendant for new Trial	110	73
Docket entry of overruling of Motion for new Trial	112	74
Docket entry of filing of Additional Findings of Fact and Conclusions of Law	113	74
Additional Findings of Fact and Conclusions of Law	114	74
Motion for extension of time to file Transcript	115	75
Order extending time to file Transcript	117	76

	Original	Print
Stipulation as to record on Appeal	118	77
Stipulation for omission of certain matters from record on appeal	119	78
Clerk's Certificate to Transcript	122	80
Statement of Errors and Points relied upon	123	81
Proceedings in U. S. Circuit Court of Appeals	86	86
Appearance of Counsel for Appellant	86	86
Appearance of Counsel for Appellee	86	86
Order of Submission	87	86
Opinion, U. S. Circuit Court of Appeals	88	87
Judgment, U. S. Circuit Court of Appeals	97	94
Petition of Appellant for Rehearing	98	95
Order denying Petition of Appellant for a Rehearing	102	99
Clerk's Certificate to Transcript	103	99
Order allowing certiorari		100

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the November Term, 1940, of said Court, before the Honorable Archibald K. Gardner, the Honorable Joseph W. Woodrough and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the fifth day of July, A. D. 1940, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein D'Oench, Duhme & Co., Inc., a Corporation, was Appellant and the Federal Deposit Insurance Corporation, a Corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal to Circuit Court of Appeals.

(Filed April 6, 1940.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. #3

D'Oench, Duhme & Co., Inc., a corporation, Defendant.

Notice is hereby given that D'Oench, Duhme & Co., Inc., the defendant above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 8th day of January, 1940.

J. W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,

H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants,
D'Oench, Duhme & Co., Inc.

[fol. 2] (Docket Entry of Filing of Notice of Appeal and Mailing of Copy to Counsel for Plaintiff.)

April 6, 1940.

Defendants' notice of appeal to United States Circuit Court of Appeals, Eighth Circuit, from final judgment entered herein January 8, 1940, filed in duplicate and one copy thereof mailed by Clerk of the Court to Messrs. Leahy, Walther, Hecker and Ely, attorneys of record for plaintiff. Defendant's cost bond on appeal in the sum of $250.00 filed.

[fol. 3] Appeal Bond.

(Filed April 6, 1940.)

Know All Men By These Presents that D'Oench, Duhme & Co., Inc., of St. Louis, Missouri, a corporation, as Principal, and Herman Duhme of Clayton, Missouri, and Louis H. Krietmeyer of Richmond Heights, Missouri, as Sureties, are held and firmly bound unto Federal Deposit Insurance Corporation, the above named plaintiff, its successors and assigns, in the penal sum of Two hundred Fifty Dollars ($250.00) to be paid by the said D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, for the payment of which well and truly to be made, we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, the above bounden D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, the defendant, has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, to reverse the judgment entered in the above entitled action by the District Court of the United States for the Eastern District of Missouri, against the defendant in the sum of Seven thousand Three hundred Seventy-six and 41/100 Dollars ($7376.41), together with costs.

Now, Therefore, if said D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, a corporation, shall prosecute said appeal to effect and answer all costs, if it fail to make said appeal good or if said appeal is dismissed or the judgment [fol. 4] affirmed, or if it answers such costs as the Appellate Court may award, if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

Dated April 4, 1940.

D'OENCH, DUHME & CO., INC.,
Principal.

By Herman Duhme, President.

Attest:
William Pagenstecher, Secretary.

HERMAN DUHME, Surety.

LOUIS H. KRIETMEYER, Surety.

State of Missouri,
City of St. Louis—ss.

On this 6th day of April, 1940, before me a Notary Public, within and for said city and state, personally appeared Herman Duhme, known to me to be the person described in and who executed the foregoing instrument on behalf of D'Oench, Duhme & Co., Inc. of St. Louis, Missouri, a corporation, as its President, the defendant, and known to me to be the duly authorized officer of said corporation, and he acknowledged to me that he executed said instrument and subscribed the name of said defendant as Principal thereto and his own name as President thereof.

M. F. SCHUMANN,
(Seal) Notary Public.

My commission expires: July 24, 1940.

[fol. 5] Complaint.

(Filed April 22, 1939.)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

205 vs.

D'Oench Duhme and Co., Inc., a corporation, Defendant.

1. Comes now Plaintiff, Federal Deposit Insurance Corporation and states that it is a corporation organized and existing under and by virtue of an act of Congress of the United States, being Title 12, Sec. 264 (a) United States Code Annotated; that the total issued capital stock of plaintiff is $289,299,556.99 of which amount the United States Government owns more than one-half, to-wit: the amount of $150,000,000.00; that this action arises under the laws of the United States, Title 12, Section 264 (j) (Fourth) United States Code Annotated and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000; That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and has its principal office and place of business in the City of St. Louis, Missouri.

2. Defendant on or about January 1, 1933 executed and delivered to Belleville Bank & Trust Company a promissory note in the principal amount of Five Thousand Dollars payable on demand with interest from date at the rate of six per cent per annum, a photostatic copy of which is hereto annexed as Exhibit A; that thereafter the Belleville Bank & Trust Company assigned said note to plaintiff and plaintiff is the holder thereof in due course; that interest on said note was paid to May 1st, 1933.

3. Plaintiff has demanded payment of said note from [fol. 6] defendant and payment has been refused and defendant owes to plaintiff the amount of said note and interest at six per cent per annum from May 1st, 1933.

Wherefore, plaintiff demands judgment against defendant for the sum of Five Thousand Dollars ($5000.00) and interest from May 1st, 1933, together with ten per cent (10%) additional on the principal and interest as attorney's fee, in accordance with the provisions of said note, and costs.

WILLIAM O'HERIN,
Attorney for Plaintiff,
Address: 1105 Commerce Building,
St. Louis, Missouri.

Leahy, Walther, Hecker & Ely,
Of Counsel.

Clerk's Note: Plaintiff's exhibit "A" duly attached to the original petition, is not attached hereto, for the reason that same appears as plaintiff's exhibit "1" of the transcript of the evidence and proceedings of this transcript of the record on appeal.

[fol. 8] (Summons and Marshal's Return.)

District Court of the United States for the Eastern District of Missouri, Eastern Division.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

File No. 205 vs. Civil Action

D'Oench Duhme Company, Inc., a corporation, Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon William O'Herin, Esq., plaintiff's attorney, whose address

is 1105 Commerce Bldg., St. Louis, Mo., an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAS. J. O'CONNOR,
Clerk of Court.
By Ruby Barham,
Deputy Clerk.

(Seal of Court)

Date: April 22, 1939.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 9] Return on Service of Writ

I hereby certify and return, that on the 24th day of April 1939, I executed the within summons by serving it on the within-named D'Oench Duhme Company, Inc., a corporation, by delivering a true and correct copy of Summons and Petition as furnished by the Clerk of the Court to Louis H. Krietmeyer, Vice President of the within-named D'Oench Co., Inc., a Corp., at St. Louis, Missouri.

WILLIAM B. FAHY,
United States Marshal.
By Tilden Delaney,
Deputy United States Marshal.

Marshal's Fees

Travel	$ .06
Service	4.00
	4.06

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

Endorsed: Filed in U. S. District Court on April 29, 1939.

[fol. 10] Answer

(Filed May 16, 1939)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205 vs.

D'Oench Duhme Company, Inc., a corporation, Defendant.

1. Defendant, designated in plaintiff's Petition as D'Oench Duhme Company, Inc., a corporation, denies that it is a corporation or that it ever was incorporated because at the time of the commencement of said action, there was not, nor is there now, any such corporation as the D'Oench Duhme Company, Inc., named as defendant herein, but that the true name of such defendant is D'Oench, Duhme & Co., Inc.

2. The complaint fails to state a claim against defendant upon which relief can be granted.

3. Defendant admits plaintiff is a corporation organized and existing under and by virtue of an Act of Congress of the United States.

4. Defendant admits that on or about January 1, 1933, it executed and delivered to Belleville Bank & Trust Co., a bank doing business in the City of Belleville, Illinois, a promissory note in the principal amount of $5,000 payable on demand and that said note recites it shall bear interest from date at the rate of six per cent per annum.

5. Defendant states it is without information concerning the total issued capital stock of plaintiff and what part thereof may be owned by the United States government but said allegations in plaintiff's Petition are immaterial and redundant and should be stricken therefrom.

[fol. 11] 6. Defendant denies that the Belleville Bank & Trust Co. assigned said note to the plaintiff and that the plaintiff is the holder thereof in due course and states that plaintiff is the holder thereof after maturity; defendant further denies that it has paid any interest on said note.

7. Defendant denies each and every other allegation contained in the complaint.

8. Defendant further answering states that at the time said note was executed by the defendant, the defendant never received any benefit of the same and said note was given without any consideration whatever; that said note is a renewal note of one of a series of renewal notes given by the defendant to the Belleville Bank & Trust Co. at the request of said Belleville Bank & Trust Co. and that the original notes, out of which the note herein sued on grew, were originally executed on or about August 1, 1926, and consisted of two promissory notes, one in the principal amount of $2,000, payable on demand, a photostatic copy of which is hereto annexed as defendant's Exhibit A and the other in the principal amount of $3,000 payable on demand, a photostatic copy of which is hereto annexed as defendant's Exhibit B; that at the time said notes were originally executed by the defendant, the defendant never received any benefit of the same and said notes were given without any consideration whatever; that contemporaneously with the giving of said notes defendant received from the Belleville Bank & Trust Co. an agreement that said notes would not be called for payment, and an agreement that no suit would be brought on said notes.

9. Defendant alleges that the plaintiff is engaged in the business of insuring banks coming within the provisions of Title 12, Section 264, United States Code Annotated; that the said Belleville Bank & Trust Co. was one of the banks so insured by plaintiff corporation on or about the 10th day of March, 1933; that said bank was insured by plaintiff at all times thereafter and until on or about the ..... day of February, 1938, said bank was [fol. 12] closed; that during all of said time plaintiff had access to all of the books and records of said bank and did examine the same many times and was familiar with its affairs and banking transactions; that by reason of such relationship plaintiff had or by the exercise of reasonable care could have had full knowledge of the agreements and defenses existing between said bank and this defendant and if the plaintiff was assigned said note then plaintiff took the same with full knowledge of the circum-

stances and defenses herewith pleaded; that by reason thereof plaintiff is estopped to assert a claim against the defendant, or to demand payment of said note, or to file suit thereon.

10. Defendant alleges that at the time the plaintiff took over from the bank the note herein sued on and at all times theretofore said note showed on its face that no interest had been paid thereon since the date of the note, and showed that said note had been dishonored and plaintiff had notice thereof; and alleges further that the endorsement of interest paid as now shown by the copy of the note attached to plaintiff's Petition was made thereon either by the plaintiff or by the said Belleville Bank & Trust Co. at the plaintiff's direction after said note was in the possession of the plaintiff and without any payment being made thereon by defendant.

11. Defendant alleges that even if the plaintiff was the holder of said note in due course, which this defendant denies, plaintiff only holds said note as security to the obligation of said bank to repay to plaintiff the amount paid by plaintiff on its guaranty; that by reason thereof and because there is an agreement by said bank not to demand payment of said note nor to file suit thereon, this plaintiff is estopped to demand payment thereof or to file suit thereon until all other assets of said bank which the plaintiff now holds or may hold have been exhausted and plaintiff has determined that such assets, exclusive of the note executed by the defendant herein, is insufficient to reimburse plaintiff the money it has paid by reason of its guaranty.

12. Wherefore, defendant demands:

(1) That the Court dismiss the action or in lieu thereof [fol. 13] quash the return of service of summons because at the time of the commencement of said action there was not, nor is there now, any such corporation as the D'Oench Duhme Company, Inc.

(2) That the Court dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(3) That the Court discharge defendant from all liability in the premises.

(4) That the Court award to the defendant its costs herein.

JOHN W. GIESECKE,
Attorney for Defendant,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.

[fol. 14] State of Missouri,
City of St. Louis—ss.:

William Pagenstecher, of lawful age, being duly sworn upon his oath states that he is the Secretary of D'Oench, Duhme & Co., Inc.; that there was not, nor is there now, to the knowledge of this affiant any such corporation as the D'Oench Duhme Company, Inc. designated in plaintiff's Petition as a corporation.

And further affiant saith not.

WILLIAM PAGENSTECHER.

Subscribed and sworn to before me this 13th day of May, 1939.

M. F. SCHUMANN,
(Seal) Notary Public.

My commission expires: July 24, 1940.

[fol. 15] (Reply filed; Motion of Defendant to strike Reply overruled; Cause submitted, November 20, 1939.)

Before Hon. J. C. Collet.

November 20, 1939.

Now plaintiff's reply to defendants answer is filed herein by leave. Oral motion of defendant to strike said reply of plaintiff is made, submitted and overruled.

Whereupon final hearing of cause before the Court is commenced and concluded and issues submitted to the Court on briefs to be hereafter submitted within ten days. And now the Court orders transcript of evidence to [bw] delivered within ten days.

[fol. 16] Reply.

(Filed Nov. 20, 1939.)

Comes now plaintiff and by leave of Court files this its reply to defendant's answer and for said reply denies each and every allegation contained in said answer.

Further replying plaintiff states that the note here sued on, if given as a renewal note of one or more prior notes given by the defendant to the Belleville Bank & Trust Company, as alleged by defendant, is a new contract and not subject to any defenses which defendant alleges it had to said prior note or notes. That if, as alleged, the note here sued on and those notes prior thereto of which it was a renewal, were merely accommodation paper and given without a consideration, all of which is denied by plaintiff, then defendant is estopped to assert said defenses for the reason that the execution of the aforesaid notes was made for the purpose of permitting the Belleville Bank & Trust Company to avoid having its books and records show any past due bonds or obligations in the assets of said Bank which would constitute a misrepresentation of the assets of said Bank and deceive the Creditors, State Banking authorities and this plaintiff in any examination of the condition of said Belleville Bank & Trust Co., and this fact was well known to defendant Company, its officers and [fol. 17] agents who thereby participated in said misrepresentation. And defendant is further estopped to assert the hereinabove mentioned defense for the reason that defendant paid to the Belleville Bank & Trust Company interest on said notes from August, 1926 until March, 1932 in the amount of $1601.56 in order that the aforesaid notes would appear in the records of said Belleville Bank & Trust Company as a good asset or live paper, which likewise would serve to misrepresent the condition of said Bank to the Creditors of said Bank and the examining authorities, all of which was known to defendant, its officers and agents and in which they participated.

LEAHY, WALTHER,
HECKER & ELY,
Attorneys for Plaintiff.

[fol. 18] Transcript of Testimony and Proceedings.

(Filed Nov. 28, 1939.)

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation,
Plaintiff,
No. 205. vs.
D'Oench, Duhme Company, Inc., a corporation,
Defendant.

Be It Remembered, that on November 20, 1939, at 4:15 P. M., this matter coming on to be heard before the Hon. John C. Collet, Judge of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, in Court No. 3 thereof, at Federal Building, 12th and Market Streets, in the City of St. Louis and State of Missouri, the following proceedings were had:

Appearances:

For Plaintiff: Leahy, Walther, Hecker & Ely, By William O'Herin, Esq.

For Defendant: John W. Giesecke, Esq.

[fol. 19] Mr. O'Herin: Now, with respect to the jurisdictional facts, Your Honor, it is agreed that the Federal Depost Insurance Corporation is a corporation organized and existing under an Act of Congress of the United States, being Title 12, Section 364 (j) (Fourth), United States Code Annotated; that the total issued capital stock of the Federal Deposit Insurance Corporation is $289,299,556.99, and that of that amount the United States Government owns $150,000,000. (At this point a brief remark was made off the record) It is further agreed that this suit arose under the laws of the United States, Title 12, Section 264 (j) (Fourth), United States Code Annotated.

It is further admitted that on or about January 1, 1933, the defendant Company executed the note in the principal amount of $5,000, which is here in suit. Is that correct?

Mr. Giesecke: Yes, sir.

Mr. O'Herin: And I believe we also agreed that it might be admitted that der and was made for payment. Or do you want me to put that in evidence?

Mr. Giesecke: Wait a moment until I confer with my client.

Whereupon, the plaintiff to sustain the issues on its part offered the following evidence:

(A note and a photostatic copy thereof are marked by the reporter "Plaintiff's Exhibit 1")

Mr. O'Herin: At this time, Your Honor please, I would like to introduce in evidence the original note sued on here, which has been marked "Plaintiff's Exhibit #1", and ask [fol. 20] permission to substitute a [photostratic] copy of it.

The Court: Is that agreeable?

Mr. Giesecke: That is agreeable; yes, sir.

The Court: Very well.

(Which said "Plaintiff's Exhibit 1" is as follows:

Belleville Bank & Trust Company
Belleville, Illinois

#42561-

$5000.00/100 Belleville, Ill. Aug 1st 1933

M Stewart after date, for value received, we promise to pay to

Belleville Bank & Trust Company

Five thousand 00/100 DOLLARS,

with interest from date at the rate of 6 per cent. per annum, payable semi-annually and ten per cent. additional on the principal and interest as Attorney's fees in case said note and interest is not paid when due and the same is placed in the hands of an Attorney for collection.

Protest, presentation and notice waived. Payable at the office of BELLEVILLE BANK AND TRUST COMPANY at Belleville, Illinois.

No. 44069 Due

Renewal 459

D'Orsay Perfume Co Inc
by Louis N. Kreitzman
Secy

PLEDGE OF COLLATERAL.

BELLEVILLE, ILL. Aug 1st 1933

Being one of the makers of the above promissory note and being desirous of securing the payment thereof, as also any other indebtedness and liability due or to become due or that may hereafter be contracted by ____ with the payee of said note as collateral security therefor, pledge the following securities, to-wit:

No 3 - U. S. Steam Navigation Co. 1st Mtge. Sinking Fund 6% Gold Bonds $1000 - Each

No 4 - 10 Kentucky & Mississippi Co. 1st Mtge. 6% Gold Bonds $1000 - Each

which said security, securities, or any part thereof or any addition thereto or substitute therefor We hereby give to said pledgee, or its Attorney or Agent, authority and power to sell upon the non-payment of the said note; or at any time before maturity of said note, if in the judgment of the said pledgee said security, additions thereto or substitute therefor, or any part thereof shall have depreciated in value; such sale may be made public or private in the discretion of the pledgee and with or without advertising the same, or giving any notice of such sale or redemption to pledgor; and hereby waiving all right of redemption after such sale and also expressly waiving and releasing said pledgee or its assignee or assignees from the obligation of presentment for payment, protest or notice of dishonor of any of said collateral securities. And said pledgee is hereby given the right and privilege of becoming the purchaser of said security, securities, additions thereto and substitutes therefor, or any part thereof at such public or private sale and authorize the said pledgee in its discretion to enforce the collection of said security, securities, additions thereto and substitutes therefor, or any part thereof by suit or otherwise and to employ an Attorney or Attorneys for such collection or legal proceedings. The proceeds of such sale or collection of said security, securities additions thereto and substitutes therefor, shall be applied as follows: First, to the payment of all costs, expenses and Attorney's fees incurred in making such sale, collection or instituting legal proceedings; second, to the payment of the said promissory note; third, apply the balance, if any, to the payment of any other indebtedness owing by We to the pledgee hereof at the time of such sale or collection, and the surplus, if any, pay to We

D'Orsay Perfume Co Inc
by Louis N. Kreitzman
Secy
PLEDGOR

INTEREST PAYMENTS.			
DATE	PAID TO	AMOUNT	
8-10-28	5-1-33	100	00

Offset 5% 8/10-33

EXHIBIT "A".

PAY TO THE ORDER OF

Federal Deposit Insurance Corporation.

-without recourse

BELLEVILLE BANK & TRUST CO.

By [signature]

ASST. CASHIER

DATE	PAID	BAL.	

[fol. 22] (The reporter marks for identification a paper consisting of four sheets "Plaintiff's Exhibits 2a, 2b, 2c and 2d," respectively)

Mr. O'Herin: If Your Honor please, I would like to introduce in evidence at this time an application to the Federal Deposit Insurance Corporation for a loan under Section 12b ..... of the Federal Reserve Act, which was made by the Belleville Bank & Trust Company, and which consists of four pages and has been marked "Plaintiff's Exhibit 2a to 2d," inclusive. And I might say at this time that this is in a bound record of the plaintiff company, and we will have a separate copy made and furnish Mr. Giesecke and Your Honor a copy, if we may have the permission so to do.

The Court: That is entirely satisfactory.

Mr. O'Herin: And it is agreed there is no question in this case but what the officers of the Belleville Bank & Trust Company had authority to execute this application and make this loan from the Federal Deposit Insurance Corpo-
[fol. 23] ration. That is another matter Mr. Giesecke and I agreed upon.

(Which said Plaintiff's Exhibit "2a" and "2d" are annexed hereto in part as per stipulation; exhibits "2b" and "2c" are omitted as per stipulation.

[fol. 24] (Plaintiff's Exhibit 2.)

Pl Ex 2a
11/20/39

Application to Federal Deposit Insurance Corporation for Loan Under Section 12B, (n) (4), of the Federal Reserve Act, as Amended.

The Belleville Bank & Trust Company (hereinafter called Bank), a corporation duly organized and existing under and by virtue of the laws of Illinois, having its principal office at Belleville, Illinois, hereby applies to the Federal Deposit Insurance Corporation, Washington, D. C. (hereinafter called the Corporation) for a loan in the principal sum of not exceeding $1,500,000.00. Said loan shall be evidenced by the note or notes of Bank in the form of Exhibit A hereto attached and shall be secured by the col-

lateral described in Exhibit B hereto attached and by all other collateral securing the indebtedness.

For the purpose of obtaining such loan and of inducing the Corporation to accept as collateral the property described in said Exhibit B together with any other property offered as collateral and of influencing the action of the Corporation on this application, Bank warrants, represents, covenants and agrees with the Corporation as follows:

1. That Bank proposes to sell certain of its assets to the The First National Bank of Belleville, a corporation organized and existing under and by virtue of the laws of United States of America, having its principal office at Belleville, Illinois, (hereinafter called Purchasing Bank) in consideration of the assumption of the deposit liabilities of Bank by Purchasing Bank. That Exhibit C attached hereto is a full, true and correct statement of the assets and liabilities of Bank according to its books and of the assets (exclusive of the proceeds of the loan for which application is made herein) to be sold by Bank to the Purchasing Bank and of the liabilities of Bank to be assumed by the Purchasing Bank, and of the properly listed in said Exhibit B.

* * * * *

4. The proceeds of the loan herein applied for will be paid over by Bank to Purchasing Bank as part of the consideration for the agreement of Purchasing Bank to assume the deposit liabilities of Bank and Bank agrees that the Corporation shall be and is hereby subrogated to the rights of the depositors against Bank to the extent of the indebtedness of Bank to the Corporation.

* * * * *

Pl. Ex. 2d.

[fol. 25] Executed this 2nd day of April, 1938.

BELLEVILLE BANK &
TRUST COMPANY,
(Exact corporate title of Bank)
By J. B. Reis President
(Seal) (Signature) (Title)

Attest:

A. H. Heinemann,

Asst. Cashier.

(Signature) (Title)

[fol. 26] (The reporter marks a note for identification "Plaintiff's Exhibit 3".)

Mr. O'Herin: I would now like to offer in evidence, if Your Honor please, the note. I might say in passing, this is a copy of the original note which is in Washington, and it has been agreed by Mr. Giesecke and myself that a copy might be used. It is a copy of the note executed by the Belleville Bank & Trust Company to the Federal Deposit Insurance Corporation, which is the note of which this note was in the collateral that was pledged to secure it. That is the principal note in the amount of $1,349,558.07. In this instance we will also furnish a copy of that in lieu of what we are now offering here, and we will be very glad to furnish Mr. Giesecke a copy of that also.

(Which said "Plaintiff's Exhibit 3" is annexed at the end of this record) Clerk's Note: Omitted as per stipulation.

(A paper is marked by the reporter for identification "Plaintiff's Exhibit 4".)

Mr. O'Herin: I offer in evidence "Plaintiff's Exhibit #4," which is page 0096 of Schedule B-7, which covers charged-off assets. Schedule B, including all of the numerals from B-1 on down to B-7, is a schedule of collateral [fol. 27] which was pledged as security to the Federal Deposit Insurance Corporation, and this particular page lists the obligation here sued on, the present note. And we will furnish a copy of that.

(Which said "Plaintiff's Exhibit 4" is annexed hereto in part as per stipulation.)

[fol. 28] (Plaintiff's Exhibit 4.)

11/20/39.

A. P.

Schedule B (7) 0096

Charged Off Assets.

Maker(s) Indorser(s)	Date	Amount of Note	Interest Rate	Due Date
D'Oench Duhme & Co. Inc. by Louis H. Krietmeyer, Secy. Secured by Bds. No. 3, 4 & 5 for $1000.00 each, Countys of Green and Randolph, Arkansas, Beaver Dam Drainage District, 5½% Improvement Bonds, dated 2/2/20, due 8/1/26, Demand Certificate No. 39-564 of Belleville Bank & Trust Co., payable to itself, amount $100 in payment of Bonds 9 and 10 for $1000.00 each of Kentawka Drg. Neshoba Cty. Mississippi.	1/1/33	5000.00	6	Dem.

[fol. 29] (A paper is marked for identification by the reporter, "Plaintiff's Exhibit 5".)

Mr. O'Herin: I now offer in evidence, Your Honor please, "Plaintiff's Exhibit 5", which is power of attorney

to the Federal Deposit Insurance Corporation, executed by the Belleville Bank & Trust Company. And in that instance we will likewise have a copy made of that and furnish one to the Court and one to Mr Giesecke.

(Which said "Plaintiff's Exhibit 5" is annexed at the end of this record.) Omitted as per stipulation.

R. R. BANJAN, of lawful age, produced, sworn and examined, testified on behalf of plaintiff as follows:

Direct Examination.

By Mr. O'Herin:

Q. Please state your name.

A. R. R. Banjan.

Q. Where do you live? A. Belleville, Illinois.

Q. What is your business?

A. Assistant liquidator of the Federal Deposit Insurance Corporation.

[fol. 30] Q. And as such are you directing or assisting in any way the handling of the matters on behalf of the Federal Deposit Insurance Corporation in connection with the Belleville Bank & Trust Company and the loan which the F. D. I. C. made to that bank? A. I am.

Q. Now I show you here Plaintiff's Exhibit No. "3", which is a demand note dated April 4, 1938, executed by the Belleville Bank & Trust Company, payable to the Federal Deposit Insurance Corporation at its Washington office, in the principal amount of $1,349,558.07, and ask you if demand was made for the payment of that note to the Belleville Bank & Trust Company; and if so, when?

A. Demand was made by the Washington office during the month of April, 1938.

Q. Now then, I show you here Plaintiff's Exhibit No. "1", which is a note of D'Oench, Duhme Company, Incorporated, in the amount of $5,000, payable to the Belleville Bank & Trust Company, dated January 1, 1933, and ask you if that note was received by the Federal Deposit Insurance Corporation as collateral to the principal note executed to the F. D. I. C. by the Belleville Bank & Trust Company?

A. Yes, sir; it was.

Q. And it shows, I believe on its back, that it was en-
[fol. 31] dorsed to the F. D. I. C. by the Belleville Bank & Trust Company? A. Yes, sir.

Q. Now then, thereafter was demand made on D'Oench, Duhme Company for payment of that note. And if so, do you know when that was, or do you have any record of it?

A. That demand was made for payment of that note, but I do not have a carbon copy of that letter with me where the demand was made.

Q. You wrote a letter to D'Oench, Duhme Company?

A. Yes, sir; but I do not have that file.

Q. Do you know about when it was made? What is your best recollection on it?

A. Well, that demand was made some time during 1938. I can't say. The latter part of 1938.

Q. And nothing has been paid to the F. D. I. C. on it subsequent to that demand?

A. Well now, there was a credit placed on that note, this particular note, $5,000, of $100.

Q. You might as well explain that right now because they will wish to have that in the record in any event.

A. When the Federal Deposit Insurance Corporation took over those assets, in this file with the collateral was a certificate of deposit dated August 14, 1937, Number 39564, and together with that was an invoice showing that Sed-
[fol. 32] don, Morfit & Harvey, Incorporated, purchased $2,000 of the Missippi Kentawaka drainage bonds due 1926, at $5 flat, and on October 10, 1938, this $100 was used to pay the interest on this note to May 1, 1933, using this certificate of deposit to do so, and that was a payment that was made, which is endorsed on the note.

Q. And other than that no other payment has been made?

A. No other payment has been made.

Q. And at the time demand was made on the defendant Company by the plaintiff, no payment was made at that time or subsequent thereto?

A. No, sir.

Mr. O'Herin: You may inquire.

Cross-Examination.

By Mr. Giesecke:

Q. Mr. Banjan, the note of D'Oench, Duhme Company, to which you have reference is listed in these schedules as a charge-off asset of the Belleville Bank & Trust Company? Is that correct? A. Yes, sir.

Q. When was that charged off?

A. That note was charged off on July 29, 1935.

Q. And at the time, then, that the bank failed and the F. D. I. C. came in and entered into this transaction at the Bank, at no time between 1935 and that time was that note ever put back as an admitted asset, was it?

[fol. 33] A. State that again.

Q. I mean between 1935 and the time you took over the asset as collateral, at no time was that note ever listed again as an admitted asset of the Belleville Bank & Trust Company?

A. Not in their statement; no, sir. It was in the charge-off assets.

Q. Now, the Federal Deposit Insurance Company has examiners, has it not? A. Yes, sir.

Q. And it is their duty to frequently examine insured banks? A. Yes, sir.

Q. Can you tell us when the Federal Deposit Insurance Corporation examiners examined the Belleville Bank & Trust Company?

A. The Federal Deposit Insurance Corporation examined the Belleville Bank & Trust Company on April 23, in 1934, April 26th, in 1935, April 27th in 1936, and September 20th in 1937.

Q. And when was it you understood the note was charged off?

A. The note was charged off on July 29, 1935.

Q. Was that because the Federal Deposit Insurance Corporation told the Bank to charge it off?

A. I couldn't answer that.

Q. You don't know? A. No, sir.

Q. But if it was charged off in 1935 the Federal Insur-

[fol. 34] ance Examiner thereafter would be aware of the fact the note had been charged off? A. Yes, sir.

Q. Now, the note from D'Oench, Duhme Company, doesn't it show on its face that is a renewal note?

A. Yes, sir.

Q. And will you tell the Court what is the date of the interest endorsement on the back of that?

A. August 10, 1938.

The Court: That is the endorsement item?

A. Yes, sir.

Q. That was subsequent to the time the note was in possession of the Federal Deposit Insurance Corporation, when they first got it? They first got it in April, 1938?

A. Yes, sir.

Q. And that endorsement was made by the Federal Deposit Insurance Corporation? A. Yes, sir.

Q. No money was ever paid any time from January 1, 1933, up until the present time on that note by D'Oench, Duhme Company, Incorporated, was it?

A. January 1, 1933?

Q. Yes, sir. A. No, sir.

Q. You testified that the interest credit on the note came from a certificate of deposit, I think?

[fol. 35] A. Yes, sir.

Q. Was any demand ever made on D'Oench, Duhme Company? Or rather was any notice ever given to them that these two thousand dollar bonds were going to be sold?

A. I can't answer that.

Q. You don't know that?

A. No, sir; I don't know.

Q. Now, the endorsement from the Belleville Bank & Trust Company to the Federal Deposit Insurance Company says "Without recourse?" A. Yes, sir.

Q. Did they put that "without recourse" on every note that they endorsed to the Federal Deposit Insurance Corporation? A. Yes, sir; every note.

Q. They didn't distinguish between those which were among the charged off assets and those which were among the other assets in these schedules?

A. None whatever. That was on every note.

Q. On every note? A. Yes, sir.

Q. Mr. Banjan, I hand you herewith a page No. 0112 in the file connected with the application of the Belleville Bank to the Federal Deposit Insurance Company. It is marked "Exhibit D" and headed "Deposit Liabilities of the Belleville Bank & Trust Company, Belleville, Illinois, according to the various classes of deposits in amount

thereof subject to the maximum insurance limit of $5,000." [fol. 36] Will you tell the Court what was the insurance liability of the Federal Deposit Insurance Corporation, the maximum insurance liability of the Federal Deposit Insurance Corporation when the bank closed, as set out in that page?

A. The maximum amount of deposit liability of the bank?

Q. No, sir; of the Deposit Insurance Corporation.

A. $1,958,327.00.

Q. And what was the deposit liability of the Bank?

A. $2,795,130.55.

The Court: In other words, that meant, did it, gentlemen, that there was about approximately $800,000 on deposit in excess of $5,000?

Mr. Giesecke: Yes, sir; I was just going to get to that. The figure is $836,803.55.

Q. Now, then, the First National Bank assumed the entire deposit liability, did it not, of two million, seven hundred and ninety-five some odd thousand dollars?

A. Yes, sir.

Q. And the Federal Deposit Insurance Corporation loan was one million, three hundred and forty-nine some odd thousand dollars? A. Yes, sir.

Q. That means, then, that the First National Bank of Belleville received other assets in addition to the million, [fol. 37] three hundred and forty-nine thousand dollars furnished by the F. D. I. C. in the total sum of a million, four hundred and forty-five thousand, five hundred and seventy-two dollars?

A. Let me get those figures again here. Are you taking these two—

Q. No, sir; the difference between—

A. The difference between the insurance and the total amount of deposit?

Q. I will put the question another way: The First National Bank, before it would assume the obligation to meet the deposit liabilities of the Belleville Bank, insisted upon having assets which in its opinion were equivalent to the amount of these deposit liabilities? Isn't that correct?

A. Either assets or cash in the total amount of deposits.

Q. And the total deposit liability was two million, seven hundred and some odd thousand dollars? A. Yes, sir.

Q. And the F. D. I. C. put up a million, three hundred and some odd thousand dollars?

A. Loaned the Belleville Bank.

Q. Therefore, the total deposit liability, and amount of cash furnished by the Federal Deposit Insurance Corporation, would be $1,445,000.00, approximately?

A. Well, the value of the bonds—of course, there are [fol. 38] some offsets that might be taken.

Q. These offsets do not amount to anything of any consequence?

A. Well, that might be. I can't remember all those figures here, but there are offsets. This will tell the total amount given over to the Bank. The total $1,453,816.00.

Q. That is the total amount of the deposit liability that the First National Bank assumed?

A. Total amount of the assets.

Q. Exclusive of that loan? A. Yes, sir.

Q. And the deposit liability which they assumed was that amount of assets plus the amount of the Federal Deposit Insurance loan? Isn't that correct?

A. No, sir. It was approximately $2,896,373 and some cents. That was the amount.

Q. Well, that is—

A. The deposit liability assumed by the First National Bank of Belleville.

Q. And that is equal to the amount of the loan from the F. D. I. C. to the Belleville Bank plus the amount of the other assets which the Belleville Bank transferred to the First National Bank? A. That is right.

Q. In other words; the value of the assets exclusive of [fol. 39] the F. D. I. C. assistance was approximately, as you testified, 1,400,000 some odd dollars? A. Yes, sir.

Q. Using those figures, then, as a basis, didn't the Federal Deposit Insurance Corporation lend the Bank a sum of money larger than their liability would have been had the Bank liquidated? A. No; no, sir.

Q. You would say not? A. No, sir.

Q. The assets which the First National Bank took over exclusive of the Federal Deposit money, is roughly 1,-

500,000 and the liability which they assumed is roughly 2,800,000?

A. The amount of money that the F. D. I. C. were insuring was 1,958,000.

Q. I understand that, but I say the value of the assets, exclusive of this pledge to the F. D. I. C. was roughly a million and a half, was it not? A. Yes, sir.

Q. And the total deposit liability of the Bank was approximately $2,800,000? A. That is right.

Q. Now, if the Bank had liquidated the assets which went to the First National Bank, that million and a half would of itself have paid depositors approximately 55 cents on the dollar?

[fol. 40] A. That would if we could liquidate it. Those have to be liquidated on some of those assets, it wasn't all cash.

Q. Nevertheless, the First National Bank took them over as though they were cash?

A. They did; they gave full value; but nevertheless, they have to collect on those assets.

Q. Assuming they would liquidate for that amount, then that would have paid on the deposit liability of the Bank approximately 55 cents on the dollar without the assistance of any of the collateral which was turned over to the Federal Deposit?

A. If they collected in full on all of those assets they would have, naturally.

Q. The Federal Deposit Corporation was liable on a total deposit liability of approximately 1,950,000?

A. Yes, sir.

Q. So that if just the assets which went to the First National Bank had liquidated at 55 cents on the dollar, that would have reduced the liability of the Federal Deposit Insurance Corporation to about $1,000,000, wouldn't it?

A. No, sir; reduced it down to $1,200,000.

Q. Isn't 55 per cent of 1,950,000 approximately $1,000,000? A. $1,400,000 is what the First National took.

Q. Well, the Deposit Insurance liability was $1,900,000?

A. Yes, sir.

[fol. 41] Q. And if those particular assets liquidated at 55 cents on the dollar your Deposit Insurance liability would receive a credit of 55 per cent?

A. Of 1,453,000, which would be approximately 700,000 from 1,958,000, would be 1,200,000 left to pay, yes, sir. You mean if we got 55 cents on the dollar on the assets the First National Bank took from the Belleville Bank that the liability then of the Bank—

Q. Every depositor would receive 55 cents on the dollar out of those assets alone?

A. Oh? You didn't state it that way.

Q. All right.

A. Yes, sir; that is right.

Q. 55 cents on the dollar? A. Yes, sir.

Q. Then on 1,958,000 those depositors would have received 55 cents on the [dollars], would they not?

A. No, sir; we would not have received it.

Q. I didn't say "you". I say the depositors you insured would have.

A. The depositors were insured, they would receive the full amount of money right at the beginning when a bank fails [—] the Federal Deposit Insurance Corporation.

Q. All right; you would have received it then because you would have taken over the claim against the Bank?

A. We would have received our pro rata share on the [fol. 42] amount of claims assigned to the Federal Deposit Insurance Corporation if it had gone into receivership and that amount of money would have been liquidated.

Q. In other words, then, your claim would have been for 1,950,000? A. That is right.

Q. You would have paid off that Deposit Insurance liability. You would have a claim of 1,950,000, and on this amount on the dollar that the depositor would receive you would receive your share on the claim you had against the Bank? A. Yes, sir.

Q. If you would receive 55 cents on the dollar on your claim of 1,958,000, what would be the balance of your claim against the Bank then? It would be for 45 per cent of 1,958,000? A. Yes, sir.

Q. And that roughly would be a little less than $1,000,000, would it not? A. Yes, sir.

Q. But, as a matter of fact, you extended yourself beyond your insurance liability, did you not?

A. No, sir; no, sir, because you are assuming, of course you are assuming the full collection.

Q. Well, assuming then, assuming that the Bank collects all the assets they have received from the Belleville Bank & Trust Company, money will come back to the stockholders?

[fol. 43] A. Nobody can tell what an asset is worth until it is collected, and I wouldn't want to say we would get that much until it is collected.

Q. Do you think the First National Bank would have taken over the $1,445,000 assets unless they were sure they would get that out of it?

A. I will answer your question by citing a consolidation of banks, how they fail. I am just taking the difference between the consolidation of banks.

Mr. Giesecke: Well, we will leave that point.

Q. With respect to that certificate of deposit we were talking about a few minutes ago, to whom was that payable? A. The Belleville Bank & Trust Company.

Q. It was not payable to the D'Oench, Duhme Company? A. No, sir.

Q. In other words, after these bonds were sold, the Belleville Bank & Trust Company treated the money as its own and put the money into a certificate of deposit payable to itself?

A. I think they have a right, under the note that was assigned, to sell the collateral.

Q. Do you have that bill that showed the sale of those bonds? A. Yes, sir.

Q. Could I see that? A. Yes, sir.

Q. Will you state what that bill shows?

[fol. 44] A. "Bought from Belleville Bank & Trust Company, Belleville, Illinois, $2,000 Kentawka Drainage District bonds due 1926 at $5.00 flat, $100."

Q. It doesn't say that the bonds were for the account of D'Oench, Duhme Company? A. No, sir.

Q. That doesn't show on that bill? A. No, sir.

Q. What is the date of the bill?

A. July 30, 1937.

Mr. O'Herin: On the letter head. Where is that bill from Seddon, Morfit & Harvey, Incorporated, Investment Securities, 320 North Fourth Street, St. Louis?

Q. Can you tell when the Belleville Bank & Trust Company was insured by the plaintiff corporation?

A. On January 1, 1934, effective date of the insurance by the F. D. I. C. Corporation.

Q. And before they make this insurance they examine the Bank, don't they?

A. Well, I can't answer that whether they made an examination or not of this Bank.

Q. I didn't ask you whether they did of this particular Bank. It is customary for them to examine a bank before they insure?

[fol. 45] A. I am not in the Examining Department, and I had rather not answer because I don't know.

Q. You don't know even what the custom is?

A. No, sir.

Q. Now, Mr. Banjan, if the securities of the Belleville Bank which the Federal Deposit Insurance Corporation now holds should liquidate for a sum sufficient to pay the amount of money that you advanced them, that is if all the securities exclusive of this particular note herein sued on should liquidate, this note then would have to be returned to the Belleville Bank & Trust Company? Isn't that correct? A. Yes, sir.

Q. I think you stated on direct examination, Mr. Banjan, that it was the practice of the Federal Deposit Insurance Corporation to call its demand notes at once? Is that correct?

Mr. O'Herin: No, sir; I made that statement across the table. He said that demand was made on that note in April, 1938, I believe.

Mr. Giesecke: And that is the date of the note also, April, 1938?

A. Yes, sir.

Q. Is it the practice of the Federal Deposit Insurance Corporation to always make demand on these notes promptly?

A. Yes, sir; on the notes from the Bank to the F. D. I. C. [fol. 46] They are demand notes.

Q. You don't wait a year or two years on a demand note before you make demand on it? A. No, sir.

The Court: Do I understand demand was made at that time instead of the latter part of the year 1938?

Mr. Giesecke: There are two notes he has been talking about.

The Court: I am sorry. Go ahead. You are talking about the note from the Belleville Bank to the F. D. I. C.?

Mr. Giesecke: That is correct.

Q. How long have you been connected with the Federal Deposit Insurance Corporation?

A. Since April, 1938.

Q. Were you connected with the Corporation when the Belleville Bank made its application for this loan?

A. No, sir.

Q. You were not connected with it at that time?

A. No, sir.

Q. Was Mr. Stapleton?

A. Yes, sir. You mean connected with the F. D. I. C.?

Q. Yes, sir.

A. No, sir; I can't answer when he was.

Q. You do not know?

A. No, sir; I do not.

[fol. 47] Q. Do you know whether—if you know this—when the Bank makes an application to the Federal Deposit Insurance Corporation for a loan, they require the filling out of very comprehensive forms? Isn't that correct?

A. Well, an examiner comes in and makes out those necessary forms.

Q. An examiner with the Federal Deposit Insurance Corporation? A. Yes, sir.

Q. And then those forms and that application is sent down to Washington? A. Yes, sir.

Q. With the recommendation of the Examiner, I suppose? A. Yes, sir.

Q. And the loan is not made until after the application, which lists all of the assets of the Bank, is then examined and studied?

A. Well, I don't know the procedure in Washington.

Q. But the loan, of course, is not made until after the application is sent down there?

A. I don't know. I can't answer that because I have not been in a bank where an application was made at the time.

Q. Do you think it is likely they would make a loan without first studying their application?

A. I don't know. I wouldn't want to say. An examiner is on the ground and he might recommend it without an [fol. 48] application going in. I can't say just the procedure they follow.

Q. They would not make any recommendation, you are sure, until he had conducted a thorough examination?

A. Oh, absolutley not.

Mr. Giesecke: I think that is all.

Redirect Examination.

By Mr. O'Herin:

Mr. O'Herin: Just one thing we might clear up here.

Q. I notice, Mr. Banjan, that on the back of the note where they credit the $100 payment there is a notation "offset". Will you explain for the record what is meant by "offset" there?

A. That would be a deposit insured by the Corporation, and an offset is formed where somebody owes something on one side and they have a credit on the other, they use the credit and apply it on his obligation and term that as an offset.

Q. And that is the reason you put that notation on there? A. That is the reason that is marked "offset".

Q. Now then, you have had banking experience over a number of years, I believe, before you were with the Federal Deposit Insurance Corporation?

A. Twenty years.

Q. And I will ask you whether or not it is customary to make an attempt to realize on charge-off assets, and have you as a banker ever done that?

A. No, sir. I would say when they are charged off they [fol. 49] are put away in the safe and lie there.

Q. What about the Federal Deposit Insurance Corporation, has it been the practice to collect charged-off assets when they receive them as collateral?

A. The procedure of the Federal Deposit Insurance Corporation when they take over the assets is to start out

and notify each debtor, make a demand right on through the list. Of course, the last ones to be notified would be the charge-off because they come in the last.

Q. Come in the last of the schedule?

A. Come in the last of the schedule. And we notify them right on down, make a demand on everybody that we have a note against.

Mr. O'Herin: I think that is all.

Recross Examination.

By Mr. Giesecke:

Q. You do not place much reliance upon the charged-off assets, do you? A. Yes, sir; I say we do.

Q. You say you call on your list, and your experience as a banker—

A. We start with the alphabet, "A", and go on through.

Mr. O'Herin: Schedule B-7 is near the last.

A. Naturally, the charged-off assets are not as good as the assets in the bank or there wouldn't be any charged-off assets.

[fol. 50] By Mr. Giesecke:

Q. As a matter of fact, don't you frequently with the majority of these charged-off assets find there is either some defense to them or some reason why they have been charged off, that makes them worthless?

A. Sometimes you can't locate the parties, and by the time we get them a lot of them are outlawed.

Q. In the main you find there is some reason why they have been charged off?

A. I have been receiver for National Banks since 1934, and my experience on charged-off assets, when a bank goes into receivership everybody who has a claim says there is something wrong because they owe the bank; so it has been my practice to find when you notify a debtor, he comes in, and he always has some excuse—it isn't his signature, or it has been paid, but he never can produce evidence.

Q. In other words, with many charged-off assets you are not surprised when such defense as that comes up?

A. No, sir; in any of the assets.

Q. Will you tell me with reference to this offset, I don't quite understand your explanation of that notation "offset" on the back of the note.

A. The F. D. I. C. pays any amount up to $5,000. And if somebody owes the Bank and they have a credit in the ledger, they will then take the money from his checking ac- [fol. 51] count and apply it as a part payment on his note; [of] if he has more money in his checking account than the note, they will pay the note and give him the balance. That is what we term an offset.

Q. In this case a certificate of deposit was not payable to the maker of this note, if was payable to the Belleville Bank & Trust Company.

A. That has been the practice of banks, when they sell collateral of a debtor, to put a "C.D" in.

Q. "C.D." that draws 2 per cent interest?

A. It doesn't draw any interest; a demand certificate doesn't draw any interest.

Q. They take the cash and put it in a certificate of deposit? A. Sometimes.

Q. And do not credit it to the note, and claim interest at 6 per cent against the maker?

A. They do not get 6 per cent on the maker when it is charged off.

Mr. O'Herin: This was credited as interest?

A. This was credited as interest.

Q. (Mr. Giesecke) The certificate of deposit is dated 1937 you said? A. Yes, sir.

Q. But it was not credited on the note until 1938?

A. It only paid interest to May 1, 1933, so there was not any adjustment of the interest, from August 17th there was [fol. 52] not any adjustment of interest until July, 1937, on the hundred dollars, or we would have adjusted the interest as of July 30, 1937. This only paid the interest up and back to May 1, 1933; so there was no adjustment of the interest on the hundred dollars.

Q. Had that been credited to principal it would have cut down the interest that much?

A. That would cut down the interest from July 30, 1937, yes, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: That is all.

Mr. O'Herin: There is not any dispute about the proposition, as I understand you, that after the F.D.I.C. came in

possession of these assets that were given to secure the note, and among which was this note, but what they made due demand on the defendant company for the payment of the note?

Mr. Giesecke: I will say they made a demand. They didn't make any due demand.

Mr. O'Herin: I didn't quite mean that. What I meant was they made a prompt demand after they got it. Perhaps to keep the record straight I might put Mr. Stapleton on.

W. J. STAPLETON, of lawful age, produced, sworn and examined, testified on behalf of plaintiff as follows:

[fol. 53] Direct Examination.

By Mr. O'Herin:

Q. What is your name, please?

A. W. J. Stapleton.

Q. Where do you live?

A. Belleville, Illinois.

Q. What is your business?

A. Liquidator for the Federal Deposit Insurance Corporation.

Q. Are you handling the liquidation in connection with the loan that was made to the Belleville Bank & Trust Company by the F. D. I. C.? A. I am.

Q. Plaintiff's Exhibit No. "1" is the note of D'Oench, Duhme Company, which is the subject matter of this suit. Do you know approximately when the Federal Deposit Insurance Corporation made demand on D'Oench, Duhme for payment of that note, after it came into the possession of the corporation?

A. I think it was in the month of August, 1938.

Q. Had any prior demand been made, do you know?

Mr. Giesecke: By whom?

Mr. O'Herin: By the F. D. I. C. I am referring only to the plaintiff company.

A. That is all I can testify to. We sent a form letter out to all the borrowers of the Bank as soon as we could

get them all out after April 4, 1938, and it was afterwards followed up by individual letters. And I think we got through with all of them about August, 1938.

Mr. O'Herin: That is all.

[fol. 54] Cross-Examination.

By Mr. Giesecke:

Q. Mr. Stapleton, after you sent that notice to D'Oench, Duhme Company, the defendant here, did you hear from them?

A. Mr. Kreitmeyer and one of the partners—I don't know which it is—

Q. Mr. Duhme?

A. Mr. Duhme, I think it was, called at the office.

Q. What did they tell you about that?

Mr. O'Herin: Object to that as not cross-examination with respect to the subject matter of the direct examination.

(At this point a brief remark was made off the record.)

Mr. Giesecke: The purpose of the question is to show that immediately upon demand the people set up this defense that they were not—

Mr. O'Herin: I will admit that the first time they ever came in to talk to Mr. Stapleton about it they claimed they did not owe this money to the Belleville Bank & Trust Company.

Mr. O'Herin: Isn't that correct, the first time you met these gentlemen?

A. They brought some agreement that they had signed.

By Mr. Giesecke:

Q. When did you first become connected with the Federal Deposit Insurance corporation?

A. On or about April 15, 1938. However, my appointment dated back to April 2nd.

[fol. 55] Q. Did you have anything to do with the preparation of this application and the negotiations in connection with the assumption of the Deposit liabilities by the First National Bank? A. I did not.

Q. You had nothing to do with that? A. No, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: That is all.

Mr. O'Herin: Plaintiff rests.

Whereupon, the defendant to sustain the issues on its behalf offered the following evidence:

Mr. O'Herin: It is admitted that the defendant is a corporation incorporated under the laws of Missouri, I believe.

Mr. Giesecke: That is right.

Mr. O'Herin: May that be shown as part of my case, if the Court please?

The Court: Yes, sir. I notice the prayer of the answer says among other things (reading from the prayer of the answer). The admission is that the defendant is a corporation now?

Mr. Giesecke: Yes, sir; that is right. They amended.

Mr. O'Herin: We amended the caption by interlinea-
[fol. 56] tion during the summer.

The Court: All right; that clears that up. Thank you, gentlemen.

Mr. Giesecke: It is admitted that the note sued on here is a renewal note of one of the series of renewal notes given by the defendant to the Belleville Bank & Trust Company.

Mr. O'Herin: Yes, sir; we admit that. I don't know just how many of these renewal notes there were in between.

Mr. Giesecke: And it is admitted that the original notes out of which the note herein sued on grew were originally executed on or about August 1, 1926.

Mr. O'Herin: Yes, sir.

Mr. Giesecke: And consisted of two promissory notes, one for the principal amount of $2,000, payable on demand;

and the other in the principal amount of $3,000, payable on demand, and that the photostatic copy of these notes to the defendant's answer is a true copy of the notes.

Mr. O'Herin: We will admit that, Your Honor.

Mr. Giesecke: I think it is also admitted that at the time of the giving of these notes the defendant herein received from the Belleville Bank & Trust Company these two agreements, which I will introduce in evidence.

Mr. O'Herin: Yes, sir.

(Which said papers are marked by the reporter for [fol. 57] identification Defendant's Exhibits "A" and "B", respectively.)

Mr. O'Herin: I would like to qualify that admission with this understanding: I do not admit the relevancy or competency of them, but as to the identity and the fact they were given at that time, I will admit that. I am going to object to the relevancy and competency.

Mr. Giesecke: All right.

Mr. Giesecke: And that those instruments were both executed by A. H. Heineman, who at that time was Assistant Cashier of the Bank, and that he executed them on the order of Mr. Nick Wuller, Cashier of the Bank.

Mr. O'Herin: Yes, sir; we will admit that, Your Honor.

Mr. Giesecke: I will read Defendant's Exhibits "A" and "B" in evidence, Your Honor:

"Df. Ex. "A".

August 4th, 1926.

Received from D'Oench, Duhme & Co., Inc.....
Their demand note for $2,000.00, dated August 1st, 1926, to be held as security on $2,000.00 Kentawka Drainage District, Neshoba County, Missippi 6% bonds, due August 1st, 1926, Nos. 9 and 10, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid.

BELLEVILLE BANK & TRUST COMPANY,
Per A. H. Heinemann,
Officer,
Asst. Cashier."

[fol. 58] "Df. Ex. "B".

August 4th, 1926.

"Received from D'Oench, Duhme & Co., Inc..... Their demand note for $3,000.00, dated August 1st, 1926, to be held as security on $3,000.00 Beaver Dam Drainage District, Greene and Randolph Counties, Arkansas, 5½% bonds, due August 1st, 1926, Nos. 3, 4 and 5, $1,000.00 denomination.

This note is given with the understandnig it will not be called for payment. All interest payments to be repaid.

BELLEVILLE BANK & TRUST COMPANY,
Per A. H. Heinemann,
Officer,
Asst. Cashier."

The Court: Who executed those?

Mr. Giesecke: The Assistant Cashier of the Bank.

Mr. Giesecke: Is it also agreed, Mr. Wuller was the managing officer of the Bank at that time?

Mr. O'Herin: Yes, sir; I will admit that. I am objecting to the relevancy and competency of this, but as far as identification is concerned, that is correct. I will make the admission about Nick Wuller, I believe he was cashier and managing officer of the Bank at the time.

Louis H. Kreitmeyer, of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

[fol. 59] Direct Examination.

By Mr. Giesecke:

Q. Please state your name.

A. Louis H. Kreitmeyer.

Q. What is your business?

A. Investment Securities.

Q. You are connected with the defendant in this case, D'Oench, Duhme Company, Incorporated?

A. Yes, sir.

Q. In what capacity? A. Vice-President.

Q. And in 1926, on August 1, 1926, what was your capacity?

A. Salesman.

Q. With that same Company?

A. With the same Company.

Q. Mr. Kreitmeyer, I will ask you if you will outline to the Court the transactions which occurred about August 1, 1926, with reference to the subject matter in this suit, from the very beginning of these transactions right on through. Give it in your own outline.

A. Prior to August 1, 1926, we had sold the Belleville Bank & Trust Company bonds, $2,000 Kentawka Drainage District in Neshoba County, Mississippi, and $3,000 Beaver Dam Drainage District in Arkansas. Those bonds matured on August 1, 1926.

Q. Do you know when you sold them those bonds?

A. In 1918 and 1920, the Belleville Bank & Trust Company sent us those bonds for collection. As they were payable to the Bank at St. Louis, we presented them at the Bank for payment, and there were not funds for the pay-

[fol. 60] ment of the bonds by these paying agents. We so notified the Belleville Bank & Trust Company, particularly Mr. Nick Wuller, who was cashier. Mr. Wuller requested us and asked us if we would give him a note, which was accommodation paper, to cover the bonds, which we did. At the same time we had the Belleville Bank & Trust Company to sign an agreement that they would not call these bonds, and any moneys paid to them that might be [call] interest would be refunded.

The Court: You called those "bonds." You mean "notes?" A. I mean notes.

Q. Subsequent to that time did they ever call that paper or make any effort to call it?

A. At no time have we had demand on this paper by the Belleville Bank & Trust Company.

Q. And at all times thereafter did you treat that purely as accommodation paper? A. We did.

Q. Did the Belleville Bank & Trust Company ever ask you to give them renewal notes? A. They did.

Q. Did you give them to them? A. We did.

Q. This note of January 1, 1933, was that the last such note you gave to them?

A. That is the last renewal note we gave them.

[fol. 61] Q. Did you ever demand that note be returned to you? A. We did.

Q. Tell the Court when you did that.

A. Sometime prior to the time the Bank closed: I think it was about three times Mr. Duhme and I went over to Belleville and made a demand for the moneys paid them, and also for the return of the notes. Mr. George Wuller, who succeeded his father as cashier, told us that he would take it up with his directors, and each time after the first time, which first time I judge was about 1930. The latter part of 1935 he told us he didn't have time or hadn't got to it, and no action was taken on it up to the time the Bank failed.

Q. Now, at the time that these notes were executed by the defendant corporation, did any consideration pass from the Belleville Bank to the D'Oench, Duhme Company, Incorporated? A. None.

Q. And has any consideration passed from the Bank to the D'Oench, Duhme Company at any time since?

A. None whatever.

Q. Where did you have this conversation with Mr. Nick Wuller with reference to the execution of these notes?

A. The principal conversation was over the telephone.

Q. And that was right after—

A. After we had notified them the bonds wouldn't be [fol. 62] paid.

Q. At that time Mr. Wuller asked you to execute these notes, on the phone, and you told him you would? Is that correct? A. He did.

Q. Where were those notes prepared?

A. In our office.

Q. Do you know where you got the note forms that you executed?

A. No, sir; I do not. It is forms we have around the office. We always have note forms in the office.

Q. Do you know where those notes said they were payable?

A. At our office.

Q. At your office? A. Yes, sir.

Q. In St. Louis, Missouri?

A. St. Louis, Missouri.

Q. Will you tell the Court why there were two notes, one for $2,000, and one for $3,000?

A. It covered the amount of the various issue of bonds. One lot of bonds were 2,000 and the other lot 3,000.

Q. And you made a note to cover each particular issue of bonds?

A. Issue of bonds; yes, sir.

Q. Now at the time—I believe you already testified to this, but to be sure—At the time Mr. Wuller asked you to [fol. 63] give him these notes, did he tell you that this was to be an accommodation to the Bank?

A. He didn't say whether it would be an accommodation or otherwise. He just asked us to give these notes, and we assumed that he was going to consider it as an accommodation paper, or he wouldn't sign the agreement.

Q. Did he tell you they would never call on you for payment of them?

A. He did. That is why we had it put in the agreement.

Mr. O'Herin: I ask that be stricken. You can't vary the written instrument by parol testimony.

The Court: Yes, sir; the instrument will show for itself. That will be understood.

Q. I will ask you if defendant's Exhibits "A" and "B" are the instruments which you received at the time of the execution of these two notes? A. They are.

Q. And they recite that the notes will not be called for payment? A. They do.

Mr. O'Herin: Object to the relevancy and competency of these two instruments.

The Court: I assume, Mr. O'Herin, that at the conclusion of the trial you intend to go into the legal question

probably by authorities; so I am not asking you now just what the theory of your objection is.

[fol. 64] (At this point a few words were spoken off the record.)

The Court: All right; go ahead; that will be fine.

Q. Now, at the time these bonds were sold to the Belleville Bank & Trust Company, did D'Oench, Duhme Company give any guaranty concerning the payment of these bonds?

A. D'Oench, Duhme Company have never guaranteed any securities we have sold, and we would not [guaranty] Government bonds we sold.

Q. Did you [guaranty] these particular bonds?

A. We did not [guaranty] these bonds; never at any time.

Q. Never at any time? A. No, sir; not at any time.

Q. When Mr. Wuller requested you to give him these accommodation notes, did he suggest at that time that you were liable for these bonds that you sold to him?

A. He did not.

Q. Did D'Oench, Duhme Company at any time, from the time of the execution of these notes, and subsequent thereto, ever owe any money to the Belleville Bank & Trust Company?

A. Not that I recall.

Q. Do you know whether any officer of the Company owed any money to them?

A. Not that I know of.

Q. Do they own any stock of the Belleville Bank & Trust Company? A. No, sir.

[fol. 65] Q. Did D'Oench, Duhme Company ever request an extension of time in connection with these notes?

A. We did not.

Mr. Giesecke: I think that is all.

Cross-Examination.

By Mr. O'Herin:

Q. Do you recall, Mr. Kreitmeyer, about how many sales you made to the Belleville Bank & Trust Company of securities of any kind after August 1, 1926?

A. No, sir; I do not.

Q. Did you sell them any? A. Yes, sir.

Q. Prior to 1918, I believe that is when you sold them the first one of these bonds?

A. I think it is.

Q. They had been a customer of yours for how long?

A. I would say maybe a year or a year and a half.

Q. And at that time you were engaged in selling securities? A. I was.

Q. And they were in your territory? A. Yes, sir.

Q. And became one of your customers? Isn't that right?

A. They did.

Q. Became a rather valuable customer, didn't they?

A. I sold them quite a few securities.

Q. How often would you call on them when you would make the rounds over there?

[fol. 66] A. I generally went to Belleville every Monday, and called on them every time I went there.

Q. Every Monday you would call on them at Belleville?

A. Yes, sir.

Q. Now, these bonds that you sold them, the interest coupons were honored, I believe, up until August 1, 1926?

A. They were.

Q. Do you know whether or not they were honored by the paying agent for the Drainage District who executed the bonds? A. They were.

Q. D'Oench, Duhme Company did not advance any of that? A. We didn't pay any interest.

Q. Now then, the bonds matured August 1, 1926. As I understand you, the Bank sent them over to you people to present them for payment to the Paying Agent? Is that true? A. That is right.

Q. And you presented them and found out that there were no funds available? A. That is right.

Q. Now then, Mr. Wuller as I understand it, then asked you to execute two notes which have been attached to your answer here? A. That is correct.

Q. One for $3,000 and one for $2,000. What did he tell [fol. 67] you he wanted those notes for?

A. I don't recall what he told me he wanted them for. I know he did not want any past due paper in the Bank.

Q. How do you know he didn't want any past due paper? A. Because he has often said that to me.

Q. Didn't he tell you that when you executed these notes? A. He may have.

Q. Well, now, you remember when your deposition was taken in this case, just last October 19th, don't you?

A. Yes, sir.

Q. And you remember this question being asked you? "Q. How did you come to execute those two notes?" "A. Those bonds were sent over for collection; they were presented to the Bank for collection, and the funds were not available, and a few days after the first—" "Q. (Interrupting) That is the first of August, 1926?" "A. Yes, sir. A few days after that Mr. Wuller suggested that we issue a note to the Bank, which would enable him to carry this note and not show any past due paper". Does that refresh your recollection any? A. Yes, sir; it does.

Q. He did say that when you executed the note?

A. If I stated that in my deposition that is what he said.

Q. You remember when your deposition was taken?

A. Yes, sir.

[fol. 68] Q. It was just taken a month ago?

A. Sure; you have the advantage, you can read what I said.

Q. You can read it and see.

A. I assume you are reading what is in there.

Q. Well, look and see if it doesn't say in the middle of the page (handing deposition to the witness).

(No reply)

Q. Now, when Mr. Wuller said that to you, you knew what he meant by that, of course, did you not?

A. Sure.

Q. He didn't want any past due assets in that bank. He didn't want any soured bonds, if you will pardon the vernacular, to show in the assets of the Bank, because the Examiner would come around and examine the bank and might raise some question about it? Isn't that true?

A. I don't know what Mr. Wuller thought.

Q. You had had considerable experience in the business of investment securities prior to that time?

A. I have been in the investment business since 1910.

Q. Since 1910? So you had been in the investment business sixteen years when this happened?

A. That is right.

Q. And when the executive officer of this Bank asked you to sign a note for the reason that it would enable him to carry your note and show no past due paper, you knew [fol. 69] what he meant by that, did you not?

A. I am not assuming what he meant or what he was thinking about. I don't know.

Q. Assuming you didn't know what he meant by it, what did you understand by it as an investment man?

A. I assumed that he didn't want past due paper in his bank.

Q. Now then, you knew, of course, this bank was subject to periodic examination by the State Bank Examiner, didn't you? A. Yes, sir; I did.

Q. And you knew that if the State Bank Examiner came around there and saw in the records of that bank among the assets D'Oench, Duhme Company's notes for $2,000 and $3,000 each, respectively, secured by certain bonds as collateral, that it would look all right to him, did you not?

A. No, sir; I didn't know that.

Q. You didn't know what?

A. That the examiner would think the note was all right.

Q. Well, you knew this, you had sufficient experience to know when he saw that in there that it would not show on its face to be something that was past due like the bonds they were supplemented by, did you not?

A. If the Bank Examiner saw the examination was suf- [fol. 70] ficient and saw the bonds were past due and would make inquiries about the note?

Q. I am asking you if you didn't know that this note, coming into the assets of the bank, would show an asset there for the examiner which in fact the Bank did not have?

A. I didn't know that. I am in no position to know what the bank examiner might think.

Q. I am not asking what the bank examiner might think, I am asking you as a man who prior to that time had had sixteen years' experience in the investment security business, if you didn't know as a fact that is what would be the result of the action in signing those two notes?

A. I am not going to assume that at all. That would be an assumption on my part trying to come to a conclusion what a bank examiner might think, and I have never been a bank examiner.

Q. Assuming if you will, for lack of a better term, for the [same] of the argument then, that you are an expert, I will ask you as an expert then to give your conclusion of what you thought about it?

A. I am not an expert. I refuse to answer as an expert. I am not an expert.

Q. Well, do you refuse to answer that question?

Mr. Giesecke: Let's have the question clarified, please, Your Honor.

[fol. 71] Mr. O'Herin: I will clarify that again.

Q. You are a man that had sixteen years' experience in the investment security business, and a banker comes to you with two past due bonds that you sold the bank, and he says, "I want you to execute $5,000 worth of notes for me so I won't have any past due paper down in my bank." Do I understand you to say you would not understand what was meant by that statement of what the effect of your permitting your notes to be put in the bank would be?

A. If the banker had $2,000 worth of notes and asked me to sign $2,000 past due bonds, and asked me to sign a $5,000 note, I would think he was crazy.

Q. If what?

A. If a banker had $2,000 and asked me to sign a note for $5,000, which you just stated, I would think he was crazy.

Q. Assuming—I may have slipped—assume he had $2,000 worth of bonds that you had sold the bank, that by the due date they were past due, and had $3,000 worth of bonds in addition to that, making a total of $5,000, and he came to you and asked you to sign a note so he would not have any past due assets shown in the bank, would you still think he was crazy? A. No, sir.

Q. Why did you do it? A. Why did we do it?

Q. Yes, sir; why did you execute $5,000 worth of notes [fol. 72] when you came over here, when you found out there was not any pay-off on the bonds?

A. It was an accommodation to the Belleville Bank & Trust Company.

Q. Why did you want to accommodate them?

A. Why did I want to accommodate them?

Q. Yes, sir. A. Because they asked us to.

Q. Did you have any other reason?

A. None whatever.

Q. You knew when you executed those notes they might be negotiated by that bank?

A. I didn't know anything of the sort.

Q. Don't you know a promissory note can be negotiated?

A. With that agreement that they have signed they can hardly be negotiated.

Q. Was this agreement attached to the notes that were left with the bank?

A. No, sir; they wouldn't do us any good leaving those with the bank.

Q. You took those notes and had them in your possession, these two—I say "notes", I mean "memorandums" Defendant's Exhibits "A" and "B"—you had them in your possession all the time?

A. Sure; that is where they belonged. They were protecting us.

[fol. 73] Q. They were never attached to the note to protect anybody to whom the note might be transferred?

A. It would be no good to us to have them attached to the note.

Mr. O'Herin: That is a question of law. You may be surprised at the ultimate answer to that, as to whether or not they were attached to the note.

Q. These Exhibits "A" and "B" have always been in the possession of D'Oench, Duhme Company?

A. Yes, sir.

Q. And they were not in the Belleville Bank & Trust Company at any time, subsequent to the execution, I mean, in their possession?

A. The Belleville Bank & Trust Company had copies. I left them with Mr. Heineman when he signed the agreements.

Q. August 4, 1926?

A. At about that time; yes, sir.
Q. I mean whatever date this is? A. Yes, sir.
Q. You didn't subsequently give them?
A. No, sir.
Q. Whatever this is, they made a carbon copy and they retained it?
A. They retained the carbon copy, and signed the original.
Q. And the signed original they gave to you?
A. Yes, sir.
[fol. 74] Q. Now, further on over in your deposition, page 11, the question, just so it will be an explanation: "Q. Do you know what information was given by either of the paying agents with respect to when they might be paid off?" "A. Very evidently there were not any funds available." "Q. And you reported that back to Mr. Wuller, and that is the time he told you that he would like to have D'Oench, Duhme Company execute these two notes?" "A. Yes, sir." "Q. So that his records would not show any past due bonds in the bank?" "A. That is right." "Q. You understood what he meant by that, I assume?" "A. Absolutely." You remember that, don't you?

Mr. Giesecke: Your Honor please, he testified to exactly the same thing here just a few minutes ago.

Mr. O'Herin: He said, No, he didn't understand.

Mr. Giesecke: He said he wouldn't conclude what was in Mr. Wuller's mind.

Mr. O'Herin: I asked him about his own conclusion afterwards.

The Court: He may answer.

(To which ruling of the Court the defendant by its Counsel then and there at the time duly excepted.)

By Mr. O'Herin:
Q. You testified like that, didn't you?
A. Yes, sir. You say that is in my deposition. I must have testified that way or it wouldn't be there.
[fol. 75] Q. Now then, the first notes you ever executed

were August 1, 1926? Those are the two notes attached to the answer. Is that correct? A. Yes, sir.

Q. Now then, subsequent to that do you know whether or not there were any renewals of these two notes prior to the execution of this $5,000 note?

A. That I can't say. I do know that is a renewal note that you have in the possession of the F. D. I. C.

Q. It is written right here. Somebody wrote "renewal" on it.

A. It is George Wuller's writing, for your information.

Q. Right here? A. Yes, sir.

Q. When the original two notes were executed, which are these that are attached to your answer, that were marked Exhibits "A" and "B" to the Company's answer in this case, they are signed by whom on behalf of D'Oench, Duhme Company? A. Herman Duhme.

Q. Do you know anything with respect to the details of where these were signed?

A. Yes, sir; they were signed in St. Louis in our office.

Q. And do you know how they were sent to the Belleville Bank & Trust Company? A. No; I do not.

Q. Did you mail them over there yourself?

[fol. 76] A. That was not in my province.

Q. You would not handle that?

A. I didn't have that part of the business. I was only a salesman at that time.

Q. Now then, subsequently, when you went over there to see Mr. Wuller, that is the son of the man you had the original transaction with, and demanded, I believe you said, to get this note back and get some money back—

A. What is that question again?

Mr. O'Herin: I will withdraw that. I will ask something else before I get up to that.

Q. Now, then, after the execution of these notes on August 1, 1926, D'Oench, Duhme Company subsequently paid the Belleville Bank & Trust Company 1600 and some odd dollars, didn't they, interest on these notes?

A. You might consider it interest. We paid that amount to them.

Q. Have you a record of the exact amount here with you? A. No, sir; I have not. It is in the deposition.

Q. The amount in the deposition is $1,601.56.

The Court: Paid by whom?

Mr. O'Herin: D'Oench, Duhme Company to the Belleville Bank & Trust Company.

Q. That was paid from August, 1926, up until about March, 1932, isn't that correct?

[fol. 77] A. I think that is correct.

Q. And on the records of the D'Oench, Duhme, Incorporated, you entered those payments as interest payments, did you not?

A. We did because we couldn't handle them any other way.

Q. I don't know what your reason was, but you did do that?

A. They had to be charged to something, and that was the only account they could be charged to.

Q. You charged that on your books as interest on these notes? Isn't that correct? A. I think that is correct.

Q. Now then, subsequently when you went over there to see—is it George Wuller? A. George Wuller.

Q. And you asked him about giving this money back because you didn't owe it to them because these were merely accommodation notes, he told you at that time that that money had been intermingled with the earnings of the bank, didn't he? A. He did.

Q. And that it was a rather difficult matter and he would have to take it up with the other officers and the Board of Directors? A. That is true.

Q. That is what he told you?

A. That is what he told us.

[fol. 78] Q. And you subsequently I think made perhaps two more demands on him, but you never did eventually get any satisfaction?

A. Although we made about three demands.

Q. Did he ever reiterate that statement to you about this money having gone into the earnings of the Bank?

A. He did, and said he had not gotten to it to take it up with the directors and officers.

The Court: Was the arrangement you would pay interest and the bank would repay that interest?

The Witness: Pardon me.

The Court: Was the arrangement, you would pay the Bank interest on the notes, and the Bank turn around and pay it back to you?

A. Absolutely. It is recited here in the agreement.

The Court: I notice the language in the statement, but I did not take it so literal.

Mr. O'Herin: Now, why did you make those interest payments on that note?

A. I don't know. That was not my department. I was a salesman at the time.

The Court: I expect we had better recess until 8 o'clock.

Whereupon, at 6:15 P. M., November 20, 1939, a recess was announced until 8:00 P. M., after which the proceedings continued as follows:

[fol. 79] By Mr. O'Herin:

Q. Now Mr. Kreitmeyer, you became an officer of the Company, did you not, in May, 1926?

A. About that time.

Q. And what office was it that you held?

A. Secretary.

Q. And subsequent to that time you were secretary of the Company at all times down until what time?

A. January, 1939.

Q. And since that time you have occupied what office?

A. Vice President.

Q. And you are vice-president at the present time? Is that correct? A. That is correct.

Q. The $2,000 worth of Kentawka Drainage District bonds—

The Witness: That deposition has a lot of mistakes in it.

Mr. O'Herin: Since you say it has a lot of mistakes, point out to His Honor about where those mistakes are.

Mr. Giesecke: You have covered part of that, haven't you?

A. Yes, sir.

Mr. O'Herin: Down to what point? And I will look at the corrections afterwards.

A. I corrected one copy of it. I don't know why you didn't get it.

Mr. O'Herin: Let me have the corrected copy, then.

(At this point occurred a short discussion off the record.)

[fol. 80] By Mr. O'Herin:

Q. You didn't have any reference to its being incorrect as to any of these questions I asked you about before we recessed for dinner, did you? A. No.

Q. According to the memorandum that you had at the time your deposition was taken the Kentawka bonds were purchased by the Belleville Bank & Trust Company on December 11, 1918, at a price of 101.536, and the Beaver Dam Drainage District bonds were purchased October 15, 1920, at 99 and interest. Does that refresh your recollection if that is correct? A. Yes, sir.

Q. As I understand, at the time you sold those bonds to the Belleville Bank & Trust Company, in your direct examination you say you had no agreement with them whatsoever that you would guarantee the payment of those bonds in the event they were not paid at maturity?

A. We never have guaranteed anything that we sold.

Q. Now then, at the time that the two notes were executed, August 1, 1926, did Mr. Wuller agree with you that when the bonds were to be paid to your company that the payment of the bonds would offset the note?

Mr. Giesecke: You say when the bonds were to be paid to the D'Oench, Duhme Company.

Mr. O'Herin: He said when the bonds were to be paid [fol. 81] to us he agreed the bonds would offset the notes.

The Witness: That was one of the mistakes I think that was to be corrected.

By Mr. O'Herin:

Q. As a matter of fact, these bonds were sent by the Belleville Bank & Trust Company over to your company for collection on August 1, 1926, isn't that true?

A. At that time or a few days prior.

Q. And you at that time presented one of them to the Lafayette South Side Bank and the other to the National Bank of Commerce, who were the paying agents and both advised you they had no funds to pay? A. Yes, sir.

Q. In your deposition you testified that Mr. Wuller at the time those notes were executed agreed with you that when the bonds would be paid that that payment would offset that note? Is that correct?

A. That is true, they would receive the payment and naturally it would be credited against that piece of paper that he gave them.

Q. Now then, subsequent to August 1, 1926, did you continue that volume of business with the Belleville Bank & Trust Company? Did it continue to be as much as it was prior to that time?

A. I can't say that. I haven't the records in front of me.

[fol. 82] Q. Would you have any recollection on that at all?

A. I continued to do business with him. I couldn't tell you about the volume.

Q. Did that have anything to do with the execution of these notes?

A. Absolutely not. We never buy any account from any one.

Q. What?

A. We never buy any account from anyone. That would be purchasing that man's business, which we never did and never intended to do.

Q. Now, at the time this note of January 1, 1933, was executed, Mr. Wuller told you at that time that the other note or notes had become too old, did he not?

A. If I recall, that is what he said.

Q. And it was at that time that you executed the new note, this last note?

A. He asked us to start with a new note. We didn't ask for a renewal of it.

Q. No; I didn't say you did. He asked for it because the old note was getting too old in the records of the bank?

A. I assume that is what he wanted.

Q. Now then, this interest, these payments that were made of 1600 some odd dollars, I believe that you testified

in your deposition they were requested by the Belleville Bank & Trust Company so as to keep this a live piece of paper? Is that correct?

[fol. 83] A. That is correct.

Q. And you knew that while the payments were being made? A. Yes, sir.

Q. And you were aware at the time that these payments were being made from time to time, were you not?

A. I wasn't positive of it, whether that was made by the cashier or a cashier's deposit.

Q. Now then, at the time that these bonds fell due, Mr. Kreitmeyer, the Belleville Bank & Trust Company sent them over here to D'Oench, Duhme Company to be presented for collection, did you at that time make any agreement with them to take those bonds back?

A. Mr. O'Herin, I have told you twice that we don't guarantee anything, and that would be guaranteeing those bonds.

Q. Well then, why did you then pledge bonds that already belonged to the Bank as collateral security for these two notes if you didn't have any deal whereby the Bank transferred them back to you or you took title to them?

A. Because Mr. Wuller asked us to.

Q. And that was the only significance of the fact that they are pledged as collateral security under these two notes?

A. There is no other reason whatsoever.

Q. You of course at no time ever notified anyone other than the officers of the Belleville Bank & Trust Company [fol. 84] that this was, as you call it, an accommodation note, did you? A. No, sir.

Q. Never notified any of the State Banking authorities or Bank Examiner?

A. I had no occasion.

Q. That was not done, in any event? A. No, sir.

Q. Nor the Federal Deposit Insurance Corporation was not given any notice with respect thereto by your Company until after they had made a demand for payment? Isn't that correct?

A. That is correct.

Mr. O'Herin: That is all.

Redirect Examination.

By Mr. Giesecke:

Q. Mr. Kreitmeyer, were you ever asked by anyone whether this was an accommodation note? A. No.

Q. Were you ever asked by anyone why you didn't pay this note? A. No, sir.

Q. Did any State Banking Examiner or any other Bank authorities, including the examiners for the Federal Deposit Insurance Corporation, ever call upon you or the Company and ask if this was an obligation of the Company?

A. No, sir.

Q. And that is true from the period 1933 to 1938?

[fol. 85] A. That is true.

Mr. Giesecke: I think that is all.

Herman Duhme, of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination.

By Mr. Giesecke:

Q. Please state your name. A. Herman Duhme.

Q. You are connected with D'Oench, Duhme Company, [defendany] in this case? A. Yes, sir.

Q. You were in 1926? A. Yes, sir.

Q. Mr. Duhme, you executed the two original notes, referred to herein, is that correct? A. Yes, sir.

Q. At the time were you familiar with the transaction?

A. I was familiar with it to the extent I knew they had these five bonds.

Q. That they had these five bonds?

A. That we had sold the five bonds.

Q. To the Belleville Bank & Trust Company?

A. To the Belleville Bank & Trust Company.

Q. And at the time you executed those notes were you aware of the fact that they were accommodation notes?

A. Yes, sir.

Q. Did any consideration move from the Belleville Bank [fol. 86] & Trust Company to the D'Oench, Duhme Company, Incorporated, for the execution of these notes?

A. No, sir.

Q. None whatsoever? A. No, sir.

Q. Has any moved at any time since from the Bank to the defendant corporation? A. No, sir.

Q. Did D'Oench, Duhme Company to your knowledge ever guarantee the payment of these bonds which were

sold in 1918 and 1920 to the Belleville Bank & Trust Company? A. No, sir.

Mr. Giesecke: I think that is all.

Cross-Examination.

By Mr. O'Herin:

Q. Mr. Duhme, in August, 1926, you were secretary of the Company I believe? Is that correct? A. Yes, sir.

Q. And you are now president? A. Yes, sir.

Q. You were vice-president in August, 1926, and you are now president?

A. I am president now.

Q. That is what I mean, you have been an officer of the Company for about twenty-two years? A. Yes, sir.

(Plaintiff's Counsel makes a brief statement off the record.)

Q. Now, at the time that you signed these notes, August [fol. 87] 1, 1926, you were aware of the purpose of the execution of these notes? A. Yes, sir.

Q. That is, as I understand it, you had no direct negotiation with Mr. Nic Wuller, but through Mr. Kreitmeyer you learned Mr. Nic Wuller had asked that you sign these notes so that the assets of the Bank would not show these past due bonds? You knew that at the time, did you not?

A. I probably knew it but—I knew of the transaction, yes, sir.

Q. I say, you knew of the transaction and you knew the reason the notes were executed by your Company through you was that Mr. Wuller did not want his records to show any past due bonds in the assets? Isn't that correct?

A. I understand that.

Q. And you knew that subsequently these payments of 1600 and some odd dollars were made to the Belleville Bank & Trust Company by your Company and were charged off on your records as interest? You were aware of that also, were you not?

A. They were charged off; I don't know that it was interest, but I knew they were charged that much amount of money.

Q. And that was paid month by month?

A. I think it was month by month. I didn't keep the books.

Q. And it was your idea that those payments were made because Nic Wuller wanted to keep that note alive, was it not?

[fol. 88] A. I understood that; yes, sir.

Q. And you know of no notification that the bank authorities of the State of Illinois ever received from your Company, or the Bank Examiners, that this note was merely an accommodation note, do you? A. I do not.

Q. And that was likewise true in respect to any notice on behalf of your Company to the Federal Deposit Insurance Corporation until at the time or subsequent to the time demand was made for payment? Is that correct.

A. Correct.

Mr. O'Herin: I believe that is all.

Redirect Examination.

By Mr. Giesecke:

Q. Did anyone ever ask you as to whether this was an accommodation note or not? A. No, sir.

Q. Did anyone ask you why the interest was not paid on it? A. No, sir.

Q. Did any State Bank Examiner or Examiner with the Federal Deposit Insurance Corporation ask you anything at all about this transaction? A. No, sir.

Mr. Giesecke: That is all.

Mr. Giesecke: That is all, Your Honor.

[fol. 89] Whereupon, the Plaintiff to further sustain the issues in its behalf offered the following evidence in rebuttal:

Mr. O'Herin: I would like at this time to introduce in evidence, if Your Honor please, the photostatic copies of defendant's exhibits which were attached to the answer filed in this case, being marked on said answer as "Defendant's Exhibit B" and "Defendant's Exhibit A". And the reporter may mark our next two exhibit numbers on there as plaintiff's exhibits in this case.

(Which said Exhibits so marked by the reporter "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7", respectively, are annexed herein below.

Mr. O'Herin: These documents have now been marked "Plaintiff's Exhibit 6" and "Plaintiff's Exhibit 7", Plaintiff's Exhibit "6" being a $3,000 note of August 4, 1926, and Plaintiff's Exhibit "7" being the $2,000 note dated August 4, 1926.

PLAINTIFF'S EXHIBIT 6.

No 49-L — For Sale by Wm. J. Kennedy Stationery Co., 512 N. Fourth Street, St. Louis.

$3,000.00 — August 1, 1926. — 19__

.-.-.-.-.-.-.-.ON DEMAND.-.-.-.-.-.-.-.-.-.-.-after date WE promise to pay to the order of Belleville Bank & Trust Company, Belleville, Illinois.

.-.-.THREE THOUSAND DOLLARS AND NO CENTS.-.-.-.-.-.-.-.-.-.DOLLARS,

for value received, negotiable and payable at D'Oench, Duhme & Co.Inc. 507 Locust St., Saint Louis, Missouri with interest after maturity at the rate of 6% per cent per annum, .-WE-. having deposited or pledged with Belleville Bank & Trust Co. Illinois, as collateral security for the payment of this note .-.-.-.-.-.-.-.-.-.-.

PLAINTIFF'S EXHIBIT 7.

No. 42-L — For Sale by Wm. J. Kennedy Stationery Co., 313 N. Fourth Street, St. Louis.

$2,000.00 August 1, 1926.

-.-.-.-.-.-.-.-ON DEMAND-.-.-.-.-.-.-.-.-.-.-.-.- after date WE promise to pay to the order of Belleville Bank & Trust Company, Belleville, Illinois.

-.-.-.-TWO THOUSAND DOLLARS AND NO CENTS-.-.-.-.-.-.-.-.-.-.-.-.- DOLLARS, for value received, negotiable and payable at D'Oench, Duhme & Co.Inc.,507 Locust St., Saint Louis, Mo. with interest after maturity at the rate of (6%) per cent per annum, WE having deposited or pledged with Belleville Bank & Trust Co. Belleville, Illinois. as collateral security for the payment of this note -.-.-.-.-.-.-.-.-.-.-.-

[fol. 91] R. R. BANJAN, previously sworn, is recalled for further examination on behalf of the plaintiff.

Redirect Examination.

By Mr. O'Herin:

Q. Mr. Banjan, I show you here the two documents marked "Defendants Exhibits A and B", dated August 4, 1926, each of them, and each signed Belleville Bank & Trust Company, by Mr. Heinemann, and ask you when was the first time that you ever saw those documents?

[fol. 92] A. The first time we knew about those was when we notified D'Oench, Duhme Company of their note, and they brought these over to the Bank.

Q. Now, as far as you know, was that the first time that anyone connected with the Federal Deposit Insurance Corporation saw these or had any knowledge of them?

A. Yes, sir.

Q. Did you subsequent to that time make a search in the records and files of the Belleville Bank & Trust Company to see if you could find copies of these there?

A. Yes, sir; I searched the records of the Belleville Bank & Trust Company for copies of these two agreements.

Q. Did you find them? A. I did not.

The Court: When you say "the record" you mean what record?

A. The correspondence, and through the note ledgers and the notes also, where I thought they might be.

Mr. O'Herin: I believe that is all.

Recross Examination.

By Mr. Giesecke:

Q. Did you ever ask Mr. Wuller about those?

A. No, sir.

Q. Did you ever ask Mr. Heinemann about them?

A. I asked Mr. Heineman about them day before yesterday.

Q. That was the first time? A. Yes, sir.

[fol. 93] Q. And what did he tell you?

A. He told me he had signed those agreements. And I asked him why he signed them, and he said, "I don't know, it has been so long ago; Mr. Wuller just asked me to sign them and I signed them." That is all he would say.

Q. Did you ask him where the copies were?

A. I asked him if there were any copies. He said he didn't know where there were any copies.

Q. Did you ask the examiners for the Federal Deposit Insurance Corporation, who examined the bank's conditions in 1934, 1935, 1936 and 1937, as you testified, did you ask them about that?

A. Yes, sir; we asked Mr. Ireland about that, and he didn't know anything about them.

Q. He knew, however, the note had been charged off?

A. Yes, sir.

Q. Did he tell you why it was charged off?

A. No; I didn't ask him.

Q. Mr. Banjan, as you know, this note in Schedule B-7 was listed among the charged-off assets of the bank?

A. Yes, sir.

Q. In your opinion, and in view of the fact you are familiar with the operation of the Federal Deposit Insurance Corporation with respect to banks in this condition, in [fol. 94] your opinion do you think that the Insurance Corporation would have refused to make this loan if this note hadn't been there and just those five bonds had been there?

Mr. O'Herin: Object to that as immaterial.

The Court: I don't grasp the significance.

Mr. Giesecke: I am trying to show, under some of the cases the courts in various jurisdictions make reference to the fact whether anybody has been harmed by the transaction.

The Court: You may answer the question subject to the objection.

Q. I asked you if in your opinion as an expert—I think you said you were a bank receiver and familiar with the affairs of banks? A. Yes, sir.

Q. And you have been connected with the F. D. I. C. for some time—if in your opinion you think the Federal Deposit Insurance Corporation would have been influenced in any way not to make this loan had the charged-off assets, instead of having this $5,000 note, had instead just the five bonds? A. No, sir; I don't think so.

Q. You don't think the Federal Deposit Insurance Corporation would have been influenced in that situation?

A. No, sir; because they had already insured the deposits and it had to pay them all. They insured all the deposits, and when they do that they would have to check [fol. 95] what assets there were when they paid off the deposit liability.

Mr. Giesecke: I think that is all.

W. J. STAPLETON, previously sworn, recalled for further examination on the part of plaintiff, testified as follows:

Redirect Examination.

By Mr. O'Herin:

Q. Mr. Stapleton, Mr. Nic Wuller, who has been referred to in this testimony here today, and who was cashier of that bank, is now dead, is he not?

A. Yes, sir.

Q. Do you know how long he has been dead?

A. No; I do not.

Mr. O'Herin: May we agree that he died in 1929?

Mr. Giesecke: That is all right with me.

Mr. O'Herin: I just want the record to show he is dead.

A. I know he is dead, but I don't know when he died.

Q. He was succeeded by Mr. George Wuller, who was cashier of the bank at the time the demand was made by D'Oench, Duhme Company that the 1600 some odd dollars, which had been paid to the bank, be returned. Do you know his whereabouts at this time?

A. He is in the Federal penitentiary at Lewisburg, Pennsylvania.

[fol. 96] Q. When was the first time that you had any knowledge of the existence of Defendant's Exhibits "A" and "B", which are the letters signed by Mr. Heinemann?

A. When demand was made on D'Oench, Duhme Company for the note, Mr. Kreitmeyer and Mr. Duhme came over and presented these memorandums of agreement.

Q. Now then, some reference has been made in this testimony to the fact that the Federal Deposit Insurance Corporation had insurance deposits of the Belleville Bank & Trust Company up to a limit of $5,000, I believe for each account, in the loan that was made by the F. D. I. C. to that

bank and the agreements that were entered thereunder. Is that an entirely separate transaction from the original insurance agreement or not? A. Oh, yes, sir.

Q. In other words, what I am getting at is this: The Federal Deposit Insurance Corporation in the liquidation of the Belleville Bank & Trust Company is not proceeding under any insuring agreement that it may have had at that bank? A. No, sir; that is a separate agreement.

Q. Which is explained by the documentary evidence, the application for loan, and so forth? A. Yes, sir.

Mr. O'Herin: I believe that is all.

[fol. 97] Recross Examination.

By Mr. Giesecke:

Q. Mr. Stapleton, it is true, however, is it not, when the bank closed the Federal Deposit Insurance Corporation became liable for the deposits which it had insured?

A. Yes, sir.

Q. And this was just its own chosen way of working that liability out? A. Yes, sir.

Mr. Giesecke: I think that is all.

Mr. O'Herin: One other thing. Can it be agreed that whatever these prices were at which the bonds were originally sold to the Belleville Bank & Trust Company, that that price was paid to D'Oench, Duhme Company?

Mr. Giesecke: Oh, yes, sir.

Mr. O'Herin: That is correct, isn't it? I think I forgot to ask that, Mr. Kreitmeyer.

Mr. O'Herin: I believe that is all, Your Honor.

Mr. Giesecke: If it is agreeable, I think I will put these notes in evidence.

Mr. O'Herin: Sure.

(Which said notes are omitted as per stipulation, being same as Defts. exhibits C & D.)

The Court: May I have the points and authorities in ten [fol. 98] days?

Mr. O'Herin: I will be glad to, Your Honor, and at the same time we will submit to you a list of authorities.

The Court: (addressing the reporter) Make a transcript of this testimony. If you need an order the record will show a request by the Court for a transcript. And may I have that transcript within ten days?

Mr. O'Herin: Do you want both memorandums in ten days?

The Court: You handle that as most convenient to yourselves, but one of you prepare your brief, or the plaintiff of course, naturally, and submit it to Mr. Giesecke and let him have time to answer, and you reply. I do not mean by "brief", gentlemen, that I care for a laboriously prepared brief because I do not want to put you to all that labor. I am very anxious, however, to have a statement of the points as you prepare them in a brief in the Supreme Court or elsewhere, the points and authorities, and any informal suggestions that you may care to add by way of explanation or argument; but the points and authorities is really what I am concerned about, because I confess that I will need your help.

Mr. O'Herin: I took the liberty to suggest to Mr. Giesecke just now, but I seem to have a different idea than the Court. It is true I represent the plaintiff in this case and [fol. 99] I guess the burden of proof is on me, but I told him, I make a prima facie case and you come in and knock me into a cocked hat. I believe the defense ought to file the first brief.

The Court: You gentlemen do that as you like.

The Court: You may recess indefinitely.

Whereupon, at 9:50 P. M., November 20, 1939, an indefinite recess was announced.

[fol. 100] (Docket Entry of Filing of Findings of Fact and Conclusions of Law and Decree.)

January 8, 1940.

Court's findings of fact and conclusions of law and decree in accordance therewith filed and entered, finding issues in

favor of plaintiff and against defendant and awarding plaintiff judgment in the sum of $5000.00 with interest thereon at the rate of 6% per annum from May 1st, 1933, to date, amounting to $1705.83, and ten per cent additional on principal and interest as attorneys fees amount to $670.58, making an aggregate judgment in the sum of $7376.41 and costs.

[fol. 101] (Findings of Fact and Conclusions of Law, etc.)

Filed January 8, 1940.

In The United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. 3.

D'Oench Duhme & Co., Inc., a corporation, Defendant.

Findings of Fact.

1. Plaintiff Federal Deposit Insurance Corporation is a corporation duly organized and existing under and by virtue of an Act of Congress of the United States; the defendant D'Oench Duhme & Co., Inc. is a corporation organized and existing under and by virtue of the laws of the State of Missouri and has its principal office and place of business in the City of St. Louis, Missouri;

This action arises under the laws of the United States and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. Defendant executed a certain promissory note (Plaintiff's Exhibit 1) here sued on dated Belleville, Ilinois, January 1, 1933, payable on demand to Belleville Bank and Trust Company, a banking Corporation of the State of Illinois, in the principal amount of $5000.00, bearing interest from date at the rate of 6% per annum, payable semi-annually and providing for ten per cent additional on the principal and interest as attorney's fees in case the said note and interest were not paid when due and was placed in the hands of an attorney for collection. Protest, presentation and notice were by the terms of the note

waived and it was payable at the office of Belleville Bank and Trust Company at Belleville, Illinois.

[fol. 102] 3. On or about April 2nd, 1938 the Belleville Bank & Trust Company executed an application to plaintiff company for a loan to be evidenced by the Bank's note attached to said application and secured by certain collateral described in an attached exhibit which included the note here sued on. By the terms of said application Belleville Bank & Trust Co. agreed to sell certain other of its assets to the First National Bank of Belleville located at Belleville, Illinois in consideration of the assumption by that Bank of the deposit liabilities of the Belleville Bank & Trust Company amounting to $2,795,130.55 and agreed that the proceeds of the loan applied for would be paid over to the First National Bank of Belleville to be applied toward payment of said deposit liabilities. In accordance with the said application, plaintiff on or about April 4, 1938 loaned the Belleville Bank & Trust Company the sum of $1,349,558.07 evidenced by said Bank's demand note in that amount of same date, payable to plaintiff and plaintiff received as security collateral referred to in the loan application including the note here sued on.

4. On the above date this note (Plaintiff's Exhibit 1) was at Belleville, Illinois endorsed without recourse by Belleville Bank & Trust Company to the order of plaintiff and said note was at said time and place delivered to plaintiff. The entire amount of the aforesaid loan of $1,349,558.07 was paid over to the First National Bank of Belleville to be applied toward payment of the deposit liabilities of Belleville Bank & Trust Co. in accordance with the application agreement. The note from Belleville Bank & Trust Co. to plaintiff, among other things, provided that upon non-payment of said note when due, plaintiff was empowered to collect in its own name all collateral securing said note. Demand for payment of said note was made by plaintiff in April, 1938 and same became due and was unpaid. Thereafter in August, 1938 plaintiff made demand on defendant for payment of defendant's note (Plaintiff's Exhibit 1) and payment was refused.

[fol. 103] 5. Defendant contends that the note in suit was given without consideration and was a renewal note of one

of a series of renewal notes given by defendant and that the original notes dated August 1st, 1926 in the respective amounts of $2000 and $3000 were given without consideration. Defendant was engaged in the investment security business and for about a year and a half prior to 1918 the Belleville Bank & Trust Co. had been a customer of defendant and during the ensuing years defendant had sold the Bank quite a few securities and a sales representative of defendant would call on the Bank once a week.

6. The evidence shows that prior to August 1st, 1926 defendant sold to Belleville Bank & Trust Company $2000 Kentawka Drainage District Bonds of Neshoba County, Mississippi and $3000 Beaver Dam Drainage District Bonds of Green and Randolph Counties, Arkansas, the first sale being in 1918 and the second in 1920. These bonds matured August 1, 1926. On maturity the Bank forwarded the bonds to defendant Company to be presented for payment to the paying agents and they were dishonored by reason of no funds. Defendant so advised the Bank and the Cashier of the Bank then requested defendant to execute two notes payable to the Bank in the respective amounts of $2000 and $3000 which would enable the Bank to carry the notes and not show any past due bonds in the Bank. The representative of defendant Company who handled these negotiations had sixteen years' experience in the investment and security business and he testified that he understood the meaning of the statements of the Bank Officer.

7. Defendant then executed two collateral demand notes each dated August 1, 1926, payable to the Belleville Bank & Trust Company. One of these notes (Plaintiff's Exhibit 7) was for $2000 bearing 6% interest from date and in the [fol. 104] collateral agreement defendant pledged as security therefor the $2000 Kentawka Drainage District Bonds heretofore mentioned. The other note was for $3000 bearing 5½% interest from date and in the collateral agreement of said note the defendant pledged as security the hereinabove mentioned $3000 Beaver Dam Drainage District Bonds.

8. Under date of August 4, 1926 the Belleville Bank & Trust Company by its Assistant Cashier acknowledged re-

ceipt in writing of these two demand notes. These receipts, omitting date and signature, are as follows:

Defendant's Exhibit A.

"Received from D'Oench, Duhme & Co., Inc..... Their Demand Note for $2,000.00, dated August 1st, 1926, to be held as security on $2,000.00 Kentawka Drainage District, Neshoba County, Mississippi 6% bonds, due August 1st, 1926, Nos. 9 and 10, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid."

Defendant's Exhibit B.

"Received from D'Oench, Duhme & Co., Inc..... Their Demand Note for $3,000.00, dated August 1st, 1926, to be held as security on $3,000.00 Beaver Dam Drainage District, Greene and Randolph Counties, Arkansas 5½% bonds, due August 1st, 1926, Nos. 3, 4 and 5, $1,000.00 denomination.

This note is given with the understanding it will not be called for payment. All interest payments to be repaid."

These receipts were not attached to the notes but were delivered to defendant and kept in its possession at all times since.

9. Plaintiff or its representatives had no knowledge of the existence of Defendant's Exhibits A and B until after demand was made on defendant for payment of the note in suit in August, 1938, when representatives of the defendant Company presented them to Mr. Stapleton of the Federal Deposit Insurance Corporation. Thereafter plaintiff's representatives made a search in the correspondence files, note ledgers and notes of the Belleville Bank & [fol. 105] Trust Company, but were unable to find any copies of these receipts therein.

10. At the time of the execution of these notes it was agreed that when the bonds pledged as collateral thereto would be paid, then that payment would be credited against the above notes that defendant Company gave the Bank.

11. From August, 1926 until March, 1932 defendant Company paid to Belleville Bank & Trust Company the

total sum of $1601.56, which payments were entered in the books of the defendant Company as interest payments on the aforesaid notes dated August 1, 1926, and this money when received was intermingled with the general earnings of the Belleville Bank & Trust Company. The testimony of defendant's officers was that these interest payments were made so as to keep the two notes as live paper. These two notes, Plaintiff's Exhibits 6 and 7, were paid by renewal notes at which time these original notes were delivered to defendant. Each note bears the notation, "Paid July 23rd, 1928 by renewal".

12. It appears that one or more renewal notes were given prior to the execution of the note here in suit, but the renewal note or notes executed in payment of the original notes, on July 23, 1928 were not available at the trial nor were any additional renewal notes if such there were. At the time of the execution of the note in suit on or about January 1, 1933, a representative of the Bank requested defendant to execute a new note as the other note or notes had become too old and in compliance with the request the present note, "Plaintiff's Exhibit 1," was signed. This note likewise contained a pledge of collateral agreement and the defendant Company as pledgor pledged as collateral for the note the same bonds which were pledged as security for the original notes dated August 1, 1926.

[fol. 106] 13. At the time of the original sale of these bonds by defendant, Belleville Bank & Trust Company purchased the Kentawka Bonds at a price of $101.536 and the Beaver Dam Drainage Distrıct Bonds at $99. and interest.

14. On July 30th, 1937 Belleville Bank & Trust Company sold the Kentawka Drainage District bonds for $100.00 and plaintiff has credited this amount to interest due on defendant's note. This credit paid interest to May 1st, 1933. No other payment has been made thereon.

15. Defendant's note was among the charged off assets of Belleville Bank & Trust Company which were conveyed to plaintiff, having been so charged off July 29th, 1935.

16. Nick Wuller, who was Cashier of Belleville Bank & Trust Company and with whom the transactions were had concerning the sale of the bonds and the execution of

the notes in 1926, is dead. Plaintiff had no notice of any contention that defendant's note was given without consideration until after it had demanded payment of defendant in August, 1938.

17. Herman Duhme, who was President of defendant Company at the time of trial and who signed the notes of August 1st, 1926 on behalf of defendant, and who at that time was defendant's Vice-President, and prior thereto had been an officer of the Company for approximately nine years, knew that those notes were executed for the reason that the Bank did not want any past due bonds in its assets and knew of the subsequent payment by defendant of the $1601.56 to the Bank and that the purpose of these payments was to keep the notes alive.

[fol. 107] Conclusions of Law.

I.

The note here sued on is deemed prima facie to have been issued for a valuable consideration and the asserted defense of lack of consideration has not been proved to the satisfaction of the Court.

II.

Plaintiff is an innocent holder of the note in question in good faith and for value and the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved.

III.

Under the facts in this case defendant is estopped to assert want of consideration as a defense.

IV.

Plaintiff is entitled to recover of defendant the principal of said note, namely $5,000.00, together with interest thereon at the rate of six percent per annum from May 1st, 1933 and ten per cent additional on said principal and interest as Attorney's fees.

A formal judgment in accordance with the forgoing findings of fact and conclusions of law will be hereafter entered of record in this cause.

J. C. COLLET,
Judge.

Dated at St. Louis, Missouri, this 8th day of January, 1940.

[fol. 108] Decree.

(Filed Jan. 8, 1940)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation, Plaintiff,

No. 205. vs. Div. 3

D'Oench Duhme & Co., Inc., a corporation, Defendant.

This cause having come on for trial on the 20th day of November, 1939, evidence was adduced by the respective parties and the cause having been submitted on written briefs and the Court having heretofore filed in said cause its findings of fact and conclusions of law, and the Court having ordered that a decree be entered in accordance with said findings of fact and conclusions of law, it is therefore Ordered and Adjudged that plaintiff recover of defendant the principal amount of said note, viz.: Five Thousand Dollars ($5000.00) and interest thereon at the rate of six percent per annum from May 1, 1933 to date amounting to Seventeen Hundred and Five and 83/100 Dollars ($1705.83) and ten percent additional on said principal and interest as attorney's fees amounting to Six Hundred Seventy and 58/100 Dollars ($670.58), making a total judgment of Seven Thousand Three Hundred Seventy-six and 41/100 Dollars ($7,376.41) and costs.

J. C. COLLET,
Judge.

Dated this 8th day of January, 1940.

[fol. 109] Docket Entry Showing Motion of Defendant for a New Trial Filed.

January 20, 1940.

Motion of defendant for a new trial filed.

[fol. 110] Motion for New Trial

(Filed Jan. 20, 1940)

And now, to-wit: on this 18th day of January, 1940, the defendant, by its attorneys, John W. Giesecke and Harold C. Ackert, comes and moves the Court for a new trial and assigns the following reasons:

1. The finding and judgment was against the evidence.

2. The finding and judgment was against the law.

3. The learned Court erred in finding as a fact that demand was made in April, 1938, for payment of the note dated January 1, 1933, and the note at that time became due and was unpaid.

4. The learned Court erred in making the following conclusions of law, to-wit:

(a) That the asserted defense of no consideration has not been proved to the satisfaction of the Court.

(b) That the plaintiff is an innocent holder of the note sued on in good faith and for value and the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved.

(c) That under the facts the defendant is estopped to assert want of consideration as a defense.

5. The learned Court erred in not finding that the contract was a Missouri contract.

6. The learned Court erred in not finding that plaintiff was not a holder in due course of the note dated January 1, 1933.

[fol. 111] 7. The learned Court erred in not finding that plaintiff is the holder after maturity of the note sued on.

8. The learned Court erred in entering judgment for the plaintiff.

Wherefore, the defendant prays that the findings of fact and conclusions of law complained of herein be amended by striking the same out and that the court make new and additional findings of fact and conclusions of law as herein

prayed for and to grant the defendant a new trial herein or to enter a new judgment herein in favor of the defendant.

JOHN W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,

HAROLD C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Defendant.

Service of copy of within and foregoing Motion for New Trial received this 18th day of January, 1940.

CHESTER H. FARTHING and
WM. O'HERIN,
Attorney for Plaintiff.

[fol. 112] (Docket entry of overruling of Motion for New Trial.)

February 5, 1940.

Motion of defendant for a new trial argued, submitted and overruled.

[fol. 113] (Docket entry of filing of Additional Findings of Fact and Conclusions of Law.)

February 21, 1940.

Additional findings of fact and conclusions of law of Hon. J. C. Collet, received and filed.

[fol. 114] (Additional Findings of Fact and Conclusions of Law.)

(Received and Filed February 21, 1940.)

The following additional findings of fact and conclusions of law are made and given.

Additional Findings of Fact.

1a. On or about August 1, 1926 defendant executed two notes for a total of $5,000. These notes were signed at defendant's office in St. Louis, Missouri, were by their terms made payable at the defendant's office in St. Louis, Missouri, and were delivered to the payee at Belleville, Illinois. These notes constituted the obligation for which the note sued on is a renewal.

2a. The evidence does not disclose where the note sued on was actually signed.

7a. The consideration for the execution of the original note was the agreement to and the pledging of the bonds as security for the notes, the application of the proceeds of the sale of the bonds to the discharge of the notes, and the making of the forbearance agreements (defendant's exhibits A and B). One reason on the part of the defendant for the execution of the notes was the hope and expectation of the continuation of the business relationship existing between the defendant and the payee of the notes.

7b. The consideration for the execution of the note sued on was the surrender of the prior notes and the renewal and extension of the obligation of the prior notes.

Additional Conclusions of Law

1a. The note sued on constitutes a new contract between the parties.

1b. The rights of the parties under the note sued on are governed by the laws of the State of Illinois.

Dated this 19th day of February, 1940.

J. C. COLLET,
District Judge.

[fol. 115] Motion of Defendant to Extend Time for Filing the Record on Appeal and Docketing the Action in the United States Circuit Court of Appeals for the Eighth Circuit.

(Filed May 6, 1940)

Comes now D'Oench, Duhme & Co., Inc., defendant in the within and above entitled cause, by their attorneys, and

states to the Court that heretofore on or about the 6th day of April, 1940, the defendant herein did duly file in this Court its Notice of Appeal as contemplated in Rule 73 of the Federal Rules of Civil Procedure and did thus and thereby appeal the final adverse judgment of this Court against the defendant herein.

That defendants in preparing their record on appeal have been delayed through no fault of their own in getting said record completed because of delay in securing from the Stenographer the stenographic reports of the proceedings and evidence in said cause and that the attorneys for said defendant have been delayed in preparing said record due to the pressure of certain other matters requiring immediate attention and that defendants need additional time in which to prepare and file said record. That no prejudice or delay will result to any of the parties by virtue of granting of the order herein prayed for for the reason that the parties to said appeal have mutually agreed and stipulated that said cause may be heard before the United States Circuit Court of Appeals at the next sitting of said Court in the City of St. Louis, Missouri, and that even though this extension be granted, said record will be filed in ample time to be docketed at the next sitting of said United States [fol. 116] Circuit Court of Appeals in the City of St. Louis, Missouri.

Wherefore, defendant prays that an order may be entered extending the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Eighth Circuit for an additional period of fifty (50) days from the date when said record on appeal is required to be filed and said cause docketed, all as contemplated under Rule 73(g) of the Rules of Federal Procedure.

J. W. GIESECKE,
H. C. ACKERT,
Attorneys for Defendant (Appellant).

[fol. 117] (Order Extending Time to File Transcript.)

(Filed May 6, 1940.)

Now on this 6th day of May, 1940, the defendant herein, having duly presented to the Court its motion and appli-

cation for an order extending the time for filing the record on appeal and docketing said case in the United States Circuit Court of Appeals for the Eighth Circuit, and the Court having read and considered said motion and being duly advised in the premises, the Court Doth Order:

That the defendant be and it is hereby granted fifty (50) days additional time from the date otherwise required by law within which to file its record on appeal and docket the cause herein in the United States Circuit Court of Appeals for the Eighth Circuit.

J. C. COLLET,
Judge of the United States
District Court.

[fol. 118] Stipulation as to Record on Appeal.

(Filed June 26, 1940.)

In lieu of the designation of contents of the record on appeal as provided for in Rule 75(a) of the Rules of Civil Procedure and as contemplated by Rule 75(f), the parties to the appeal herein hereby enter into the within written stipulation designating the parts of the records, proceedings and evidence to be included in the record on appeal and the parties do hereby stipulate and designate:

The complete record and all the proceedings and evidence in the action, including a transcript of all the evidence and proceedings at the trial which was stenographically reported, two copies of such evidence and proceedings so stenographically reported to be filed with this stipulation by the appellant.

There shall be omitted from such complete record only the formal parts of all exhibits and the formal and irrelevant portions of any documents shall be omitted and only one copy of any document shall be included as contemplated in Rule 75(e).

J. W. GIESECKE,
H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants, D'Oench,
Duhme & Co., Inc.

CHESTER H. FARTHING,
WM. O'HERIN AND
LEAHY, WALTHER
HECKER & ELY,
Bank of Commerce Bldg.,
St. Louis, Missouri,
Attorneys for Federal Deposit Insurance Corp.

[fol. 119] (Stipulation for Omission of Certain Matters from Record on Appeal.)

(Filed June 26, 1940.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Federal Deposit Insurance Corporation, a corporation,
Plaintiff,
No. 205. vs. Div. #3.
D'Oench, Duhme & Co., Inc., a corporation, Defendant.

The parties to the cause herein, in order to assist the Clerk of this Court in preparing the record on appeal to the Circuit Court of Appeals in conformity with the Rules of Civil Procedure and in order to assist said Clerk in abbreviating said record, and eliminating therefrom all matters not essential to the decision of the questions presented by the appeal, and to assist him in omitting formal parts of all exhibits and more than one copy of any document as well as to assist him in abbreviating documents by omitting therefrom all irrelevant and formal parts thereof, do hereby stipulate that the matters, things, and documents hereafter set out fall within one or the other of the classifications above referred to and should, therefore, be omitted by said Clerk in preparing the record on appeal.

Said matters, things, documents, etc. to be eliminated, omitted or abbreviated are as follows, to-wit:

1. All of that portion of Plaintiff's Exhibit 4 except the heading thereon and the account pertaining to D'Oench, Duhme & Co., Inc.

[fol. 120] 2. Plaintiff's Exhibits 2a, 2b, 2c and 2d, except caption first two paragraphs and clauses one (1) and four (4) appearing upon 2a and execution including signatures appearing on 2d.

3. Plaintiff's Exhibit 3

4. Plaintiff's Exhibit 5

5. Plaintiff's exhibits 6 and 7 (as the same are identical with exhibits attached to Defendants answer) and Defendant's Exhibits A and B may be omitted as separate parts of the record inasmuch as the same are fully set out on pages 33 and 34 respectively of the transcript of the testimony and Defendants exhibits C and D the same being identical with Plaintiff's exhibits 6 and 7 and with exhibits attached to Defendants answer.

6. The following specific minute entries in the Clerk's Office, to-wit:

a. Entry under date of April 22, 1939 (showing issuance of summons)

b. Entry under date of April 26, 1939 (showing Marshal's return)

c. Entry under date of June 22, 1939 (showing Plaintiff's Petition for Leave to Amend and Notice in connection therewith)

d. Entry under date of July 5, 1939 (showing amendment granted) (In lieu of the minute entries above set out under "c" and "d" the Clerk will simply show in the record the amended Petition, if feasible, otherwise these entries may be included.)

[fol. 121] e. Entry under date of July 18, 1939 (relative to setting of case)

f. Entry under date of October 10, 1939 (praecipe re depositions)

g. Entry under date of October 17, 1939 (re setting of case)

h. Entry under date of November 28, 1939 (re filing of transcript of testimony)

i. Entry under date of November 30, 1939 (order re filing briefs)

j. Entry under date of December 22, 1939 (re filing of depositions)

k. Entry under date of January 27, 1940 (re notice to docket motion for new trial)

7. Depositions filed in cause.

The parties by the execution of this stipulation agree that on appeal no challenge will be made by either of them with respect to sufficiency of proof on any of the above formal matters which would otherwise require production of the omitted exhibits or minute entries.

J. W. GIESECKE &
H. C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri,
Attorneys for Appellants, D'Oench, Duhme & Co., Inc.

CHESTER H. FARTHING,
WILLIAM O'HERIN AND
LEAHY, WALTHER &
HECKER,
Bank of Commerce Bldg.,
St. Louis, Missouri,
Attorneys for Federal Deposit Insurance Corp.

[fol. 122] Clerk's Certificate.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the stipulation of the contents of the record on appeal heretofore set out) of the record and proceedings in case No.

205, wherein, Federal Deposit Insurance Corporation, a corporation is plaintiff and D'Oench, Duhme and Company, Inc., a corporation, is defendant, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District this 5th day of July, in the year of our Lord, Nineteen Hundred and forty.

(Seal)
U. S. Dist. Court
East. Jud. Dist.
of Mo.
East. Div.

JAMES J. O'CONNOR,
Clerk of said Court.
By C. E. Rudolph,
Deputy Clerk.

Filed Jul. 5, 1940. E. E. Koch, Clerk.

[fol. 123] Statement of Errors and Points Relied Upon.

In The United States Circuit Court of Appeals for the Eighth Circuit.

Federal Deposit Insurance Corporation, a corporation,
Appellee,
No. 11779. vs.
D'Oench, Duhme & Co., Inc., a corporation, Appellant.

Comes now D'Oench, Duhme & Co., Inc. appellant herein, by its attorneys of record, and pursuant to the requirement of Rule 24 of this Court does hereby submit a statement of points to be relied upon by appellant as contemplated by Section 75(d) of the Federal Rules of Civil Procedure and Rule 24 of this Court and do hereby set out separately and particularly each error asserted which appellant intends to urge on this appeal. Said points and statement of errors are as follows, to-wit:

1. The Court erred in permitting the plaintiff to file its Reply containing therein an allegation and claim of estoppel against the defense asserted by the defendant in its

Answer and in so permitting plaintiff to file said Reply the Court did abuse its discretion.

2. The Court erred in overruling defendant's oral motion to strike plaintiff's Reply for the reason that said Reply did not allege any facts constituting a defense to the new matter set out in defendant's Answer.

3. The Court erred in making its additional finding of fact No. 1-a and in finding as a fact that the original notes involved in the transaction herein were delivered to the payee in Belleville, Illinois, in that there was insufficient evidence to support said finding of fact.

[fol. 124] 4. The Court erred in finding as a fact as part of its finding of facts No. 7 that the defendant "pledged as security" for the original notes the $2000 Kentawka Drainage District bonds and the $3000 Beaver Dam Drainage District bonds mentioned in the evidence in that said finding is unsupported by the evidence.

5. The Court erred in finding as a fact under the Court's finding No. 12 that the defendant "pledged as collateral" for the note sued on "the same bonds which were pledged as security for the original notes dated August 1, 1926" in that said finding is unsupported by the evidence.

6. The Court erred in making its finding of fact No. 7-a and in finding as a fact that any consideration passed from the Belleville Bank to the defendant for the original notes in, that there was no evidence to support such finding of fact.

7. The Court erred in finding as a fact under its finding 7-a that the forbearance agreements (defendant's Exhibits A and B) constituted consideration for the original notes for the reason that said forbearance agreements do not as a matter of law constitute consideration.

8. The Court erred in its finding 7-a in finding as a fact that defendant executed the original notes in the hope and expectation of continued business and that such hope and expectation of continued business constituted consideration for the issuance of the said original notes in that there was no evidence to support such a finding of fact and even if such fact existed the same would not constitute consideration as a matter of law.

9. The Court erred in making its finding of fact No. 7-b and in finding as a fact that "the consideration for the execution of the note sued on was the surrender of prior notes and the renewal and extension of the prior obligation", in that the surrender of an accommodation note does not as a matter of law constitute consideration for a renewal note.

[fol. 125] 10. The Court erred in making its finding of fact No. 9 and in finding as a fact that the plaintiff had no knowledge of the forbearance agreements until after plaintiff had demanded payment of the note sued on from the defendant in August, 1938, in that plaintiff is not a holder in due course and is, therefore, charged with constructive knowledge thereof.

11. The Court erred in making its finding of fact No. 10 and in finding as a fact that "at the time of the execution of these notes it was agreed that when the bonds pledged as collateral thereto would be paid, then that payment would be credited against the above notes that defendant company gave the bank" in that said finding is unsupported by the evidence.

12. The Court erred in making that part of its finding of fact No. 16 which states that "plaintiff had no notice of any contention that defendant's note was given without consideration until after it had demanded payment of defendant in August, 1938", in that plaintiff was as a matter of law charged with constructive notice of such contention.

13. The Court erred in its conclusion of law I wherein it held that "The asserted defense of lack of consideration has not been proved to the satisfaction of the Court" in that such conclusion is unsupported by and contrary to the evidence and for the further reason that said conclusion is based upon the erroneous proposition that the burden of proving lack of consideration is upon the defendant.

14. The Court erred in failing to rule that the burden of proof on the issue of consideration was upon the plaintiff and that the plaintiff had failed under the evidence to establish such burden of proof by the greater weight of the evidence.

15. The Court erred in not holding and ruling that the defense of no consideration asserted by the defendant had been fully sustained and proven under the law and the evidence.

16. The Court erred in its additional conclusions of law No. 1-a holding and ruling that the note sued on constituted a new contract between the parties in that the note sued upon was a mere renewal of the original notes and as a [fol. 126] matter of law stood upon the same footing and basis as the original notes entitling the defendant to assert the same defenses as would have been available on the original notes including the defense of no consideration.

17. The Court erred in its additional conclusion of law No. 1-b ruling and holding that the rights of the parties under the notes sued on are controlled by the laws of the State of Illinois in that the rights of the parties under the note sued on are governed by the laws of the State of Missouri either on the ground that the note sued on is a Missouri contract or upon the ground that even though the note sued on be an Illinois contract yet inasmuch as the plaintiff has invoked the jurisdiction of the District Court sitting in Missouri, the plaintiff is bound by the rules of law applicable in Missouri including the right of defendant to assert the defense of no consideration under the facts of this case.

18. The Court erred in making its conclusion of law II and in holding and ruling that the plaintiff is an innocent holder in good faith and for value and that the asserted defense of no consideration cannot be maintained even though it were satisfactorily proved in that even if plaintiff was an innocent holder in good faith and for value the Court has failed to find that the plaintiff was a holder "in due course" and unless the plaintiff is a holder in due course the defense of no consideration can be maintained.

19. The Court erred in not holding that the plaintiff as a matter of law was not a holder in due course of the note sued on and that said note was subject to all defenses existing between the original parties for the reason that as a matter of law said note was past due when acquired by plaintiff.

20. The Court erred in failing to hold as a matter of law that the note sued on was past due when acquired by the plaintiff and that the plaintiff was not a holder in due course and was not entitled under the facts and law of this case to recover.

[fol. 127] 21. The Court erred in its conclusion of law III holding that "under the facts of this case defendant is estopped to assert want of consideration as a defense" in that under the facts and law of this case want or lack of consideration is a complete defense and plaintiff is not estopped from asserting said defense.

22. The Court erred in making and entering a judgment in favor of the plaintiff and against the defendant.

HAROLD C. ACKERT,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.

J. W. GIESECKE,
1010 Title Guaranty Bldg.,
St. Louis, Missouri.
Attorneys for Appellants.

(Endorsed: No. 11,779. Statement of Errors and Points relied upon.

Filed in U. S. Circuit Court of Appeals on July 10, 1940.

[fol. 86] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

D'Oench, Duhme & Company, Inc., Appellant,
No. 11,779. vs.
Federal Deposit Insurance Corporation.

The Clerk will enter my appearance as Counsel for the Appellant.

J. W. GIESECKE,
H. C. ACKERT,
706 Chestnut, St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 5, 1940.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

WM. O'HERIN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 18, 1940.

[fol. 87] (Order of Submission.)

November Term, 1940.

Thursday, November 21, 1940.

This cause having been called for hearing in its regular order, the same was argued by Mr. John W. Giesecke and Mr. Harold C. Ackert for appellant, and counsel for appellee not appearing to present oral argument, this cause is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 88] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,779.—November Term, A. D. 1940.

D'Oench, Duhme & Co., Inc., a corporation,
Appellant,
vs.
Federal Deposit Insurance Corporation, a corporation,
Appellee.

Appeal from the District Court of the United States for Eastern District of Missouri.

[February 11, 1941.]

Mr. John W. Giesecke and Mr. Harold C. Ackert for Appellant.

Mr. Chester H. Farthing, Mr. Wm. O'Herin and Messrs. Leahy, Walther and Hecker filed brief for Appellee.

Before Gardner, Woodrough and Johnsen, Circuit Judges.

Johnsen, Circuit Judge, delivered the opinion of the Court.

Two questions are determinative of this appeal: (1) Whether the promissory note involved is governed by the law of Illinois or of Missouri; and (2) whether, under the law of the applicable state, the indorsee of a demand note, given for the accommodation of the payee and negotiated more than five years after its execution, may have the status of a holder in due course.

Plaintiff (appellee) has a corporate existence under 12 U.S.C.A. §264 (Act of June 16, 1933, c. 89, §8, as amended). Defendant (appellant) is a Missouri corporation.

The action was one upon a promissory note, which defendant had executed as maker, in favor of Belleville Bank & Trust Co., as payee, and of which plaintiff claimed to be a holder in due course. The instrument was in the face amount of $5,000, was dated Belleville, Illinois, January 1, 1933, and was payable on demand, with interest semi-annually, at the office of the payee, in Belleville, Illinois. It was indorsed by the payee to plaintiff, at Belleville, Illinois, on April 4, 1938, as collateral, with other assets, for a loan made by plaintiff, under 12 U.S.C.A. §264 (n) (4), to facilitate a transfer of the deposit liabilities of Belleville Bank & Trust Co. and their assumption by another bank. By the terms of the loan transaction, plaintiff was authorized to make collection of the collateral in its own name, on any default in the payment of the principal obligation.

After such a default by Belleville Bank & Trust Co., plaintiff made demand upon defendant for payment of its note, and then instituted this action. Suit was brought in federal court under the provisions of 12 U.S.C.A. §264 (j) Fourth, and 28 U.S.C.A. §42. The case was tried without a jury. The trial court held that the note was governed by the law of Illinois, and that, under the law of that state, plaintiff had the status of a holder in due course. Judgment was rendered in favor of plaintiff, and defendant has appealed.

From the evidence, it appeared that defendant was a dealer in securities, and that Belleville Bank & Trust Co. had been one of its customers. In 1926, some Arkansas and Mississippi drainage district bonds, which defendant had sold the bank, went into default, and, to prevent their showing as delinquent assets on its records, the cashier requested defendant, as an accommodation, to execute two demand notes in favor of the bank, in an amount equal to the face of the bonds, to which the securities were to be

carried as purported collateral. The bank gave defendant receipts for the notes, which recited, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." Subsequent renewals of the notes were executed. Defendant made interest payments to the bank until 1932, which were retained by the bank, though it appears that some years later and before the note here involved was negotiated, defendant requested that these sums be returned. The original notes were executed at St. Louis and contained a recital that they were negotiable and payable at the office of defendant in that city. The contents of the intermediate renewal notes are not shown. The note here involved consolidated the amounts of the original notes and, as previously indicated, was dated Belleville, Illinois, and was made payable at the office of the Belleville Bank & Trust Co. in that city. Since 1935, the bank had carried the note as a charged-off asset.

Defendant contends that the original notes were Missouri contracts, and that all renewals should therefore be held to be governed by the law of that state. But an accommodation note, like any written instrument, is subject to competent modification. And where, on a renewal of accommodation paper, its terms and recitations are so changed as to make applicable other or different principles of law, their effect cannot be escaped by mere inferences from the original paper. An instrument that is complete, unambiguous and unimpeached must be governed by its own applicable law.

Where a negotiable instrument is executed and is payable in the same state, and there are no other controlling provisions in it, it elementarily must be held to be governed by the law of that state. A contract is regarded as having been executed where the last act necessary to make it a legal obligation has been and, under the terms of the instrument, was entitled to be done. *Hogue-Kellogg Co.* v. *G. L. Webster Canning Co.*, 22 F.2d 384 (C.C.A.4); 1 Williston on Contracts, Rev. Ed., 309, §97. In the case of accommodation paper, this is the place where it has been,

and where the parties must be held to have intended it could be, negotiated for value to a third person. *Tilden* v. *Blair*, 88 U.S. (21 Wall.) 241, 22 L. Ed. 632; *Gay* v. *Rainey*, 89 Ill. 221, 31 Am. Rep. 76; Restatement Conflict of Laws, §320; 2 Beale Conflict of Laws 1059, §320.1; 7 Am. Jur. 808, §34.

Here, the original notes were issued at St. Louis, Missouri, and contained a recital that they were negotiable and payable there. The renewal note involved in this action, however, was dated and made payable at Belleville, Illinois. It contained no provision indicating that it was not intended to be negotiated there. From the face of the instrument, it was properly in the hands of the payee in that state. In this situation, if the instrument was legally subject to negotiation, a transferee necessarily was entitled to assume and claim that the resulting contract between the maker and himself was an Illinois contract and would be governed by the law of that state.

The remaining question then is whether, under the law of Illinois, plaintiff is a holder in due course or has a status equivalent thereto.

Section 52 of the Uniform Negotiable Instruments Law provides that a holder in due course is one who, among other things, has taken the instrument before it was overdue. Section 53 provides that, "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 29 provides that an accommodation party "is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." These provisions are in force in Illinois (Smith-Hurd Ill. Ann. St., Perm. Ed., c. 98, §§72, 73, 49) under the Negotiable Instruments Law of that state, with a clause added by the legislature to Section 29 providing, "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

Defendant contends that five years ought to be held to be an unreasonable time for the negotiation of a demand note, as a matter of law; that it was in any event an unreasonable period under the facts of this case; that plaintiff must therefore be held to have taken the instrument after maturity; and that the paper was accordingly subject to all the defenses existing between the original parties.

Whether five years is an unreasonable length of time to negotiate a demand note, or whether it was an unreasonable period under the facts of this case, it is unnecessary to decide. The courts of Illinois appear to have taken the view that, notwithstanding the provisions of the Negotiable Instruments Law and the clause added to section 29 by the Illinois legislature, one to whom accommodation paper is negotiated, in good faith and for value, is in the position of, or equivalent to, a holder in due course, whether he acquires title before or after maturity. This construction necessarily is binding on us.

In the early case of *Miller* v. *Larned*, 103 Ill. 562 (1882), the Supreme Court of Illinois declared: "It is a reasonable rule that one who puts his note or bill in the hands of another to be sold or negotiated, after it is done, will not be permitted to answer the holder, who has taken it in good faith for value, that he does not owe the bill. The very purpose of making accommodation paper is, that the party favored may dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound."

In *Naef* v. *Potter*, 226 Ill. 628, 80 N.E. 1084, 11 L.R.A. (N.S.) 1034, (1907), the court extended the rule, to protect a holder after maturity where accommodation paper had been diverted from its agreed purpose. It was there held: "A transferee of accommodation paper, in good faith and for value, even after maturity and with notice that it is accommodation paper, is entitled to recover notwithstanding it has been diverted from its purpose, where there are no restrictions as to its use written into the paper and no notice of such restrictions brought to the knowledge of

the transferee." The opinion adds: "But it is said appellee accepted the note and trust deed after maturity, and the rule applicable generally to commercial paper is invoked, that the transferee of past due negotiable paper takes it subject to all defenses that might have been interposed against the original holder. This rule does not apply to accommodation paper. If it did apply to such paper the effect would be to destroy the value of all accommodation paper when the same is transferred after maturity. * * * But the law in this State * * * is, that the transferee of accommodation paper, even after maturity and with notice that it is accommodation paper, takes it discharged of all defenses that might have existed against the accommodated party."

These two cases were decided before the Negotiable Instruments Law had been adopted and become operative in Illinois. Ordinarily in this situation they would perhaps not have controlling significance; but, even since the Negotiable Instruments Law became effective there in 1907, the courts have recognized these previous decisions as declaring the existing law of the state. Thus, in *Elgin National Bank* v. *Goecke*, 213 Ill. App. 559 (1919) it was said: "Under sections 29, 63, 64, Negotiable Instruments Act * * * defining the rights and liabilities of accommodation indorsers, lack of consideration for the indorsement is no defense even against a purchaser after maturity with notice." In that case it was claimed that the notes had been diverted from the restricted use for which they were issued, and, while they seemingly had been negotiated before maturity, the opinion declares: "As they did not write such restrictions into the instruments, nor bring them to the attention of the bank at or before the time when the paper passed to it, such special purpose does not constitute a defense, even if the bank took the paper when it was past due."

Again, in *Foreman Trust & Savings Bank* v. *Cohn*, 342 Ill. 280, 174 N.E. 419 (1930), the court after setting out section 29 of the Negotiable Instruments Law in its opinion, with the addition made thereto by the Illinois legislature, that, where a transfer of accommodation paper after maturity was intended, there should be a liability

notwithstanding the holder acquired title after maturity, recognized the rule laid down in *Naef* v. *Potter, supra,* as follows: "In *Naef* v. *Potter* * * * it was held that a transferee of accommodation paper in good faith and for value, even after maturity and with notice that it is accommodation paper, is entitled to recover, notwithstanding it has been diverted from its purpose, where there are no restrictions as to its use written into the paper and no notice of such restrictions brought to the knowledge of the transferee."

In *Corrigan* v. *Harris,* 207 Ill., App. 291 (1917) which is not fully reported, the court appears to have applied a different rule, without any reference to *Naef* v. *Potter.* In *Wilhoit* v. *Searall,* 121 Kan. 239, 246 Pac. 1013, 48 A.L.R. 1273, the Supreme Court of Kansas asserts that the rule of *Naef* v. *Potter* ought not to be regarded as the law in Illinois under the Negotiable Instruments Law. But, no matter how illogical or ill-considered it may be contended that the expressions in *Elgin National Bank* v. *Goecke, supra,* and *Foreman Trust & Savings Bank* v. *Cohn, supra,* are, in their application to the provisions of the Negotiable Instruments Law, they clearly indicate that the courts of Illinois regard the rule in *Naef* v. *Potter* as still the governing law of that state. For the purposes of this case, and until its authorized tribunals declare otherwise, we must accept it as the established law of Illinois that, under its Negotiable Instruments Law, a transferee of accommodation paper in good faith and for value has a status equivalent to that of a holder in due course, whether he takes the paper before or after maturity. It may be added that, while the construction of the Negotiable Instruments Law made by the Illinois courts represents a minority American viewpoint, it has at least some support in other jurisdictions. 8 Am. Jur. 170, §426; 48 A.L.R. 1280, annotation.

While there is no evidence in the record from which it could be inferred that plaintiff had actual knowledge of the accommodation character of the paper, that question would in any event not be material under the applicable law. No issue has been raised as to the formal sufficiency of the paper as a negotiable instrument, and hence that

question also calls for no consideration. The ground of disposition here also makes unnecessary a discussion of defendant's other contentions, except to remark that the mere fact that the paper had been charged off by the bank was not notice of any infirmity in the instrument or defect in the bank's title within the meaning of sections 52(4) and 56 of the Negotiable Instruments Law. The charging off of commercial paper by a bank does not necessarily imply an infirmity in the instrument or a defect in the bank's title, and, without other circumstances, is not knowledge of such facts that the transferee's action in taking the instrument amounts to bad faith under the Negotiable Instruments Law.

Affirmed.

[fol. 97] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1940.

Tuesday, February 11, 1941.

D'Oench, Duhme and Co., Inc., a Corporation, Appellant,
No. 11,779. vs.
Federal Deposit Insurance Corporation, a corporation.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Federal Deposit Insurance Corporation, a corporation, have and recover against D'Oench, Duhme and Co., Inc., a corporation, the sum of Twenty Dollars for its costs herein and have execution therefor.

February 11, 1941.

IN THE

United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

D'OENCH, DUHME & CO., INC., a Corporation,
Appellant,
vs.
FEDERAL DEPOSIT INSURANCE CORPORATION, a Corporation,
Appellee.
No. 11,779.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLANT'S PETITION FOR REHEARING.

Comes now D'Oench, Duhme & Co., Inc., a corporation, appellant herein, and duly moves the Court to set aside its opinion and judgment herein rendered under date of February 11, 1941, and to grant said appellant a rehearing in the cause herein.

As and for its ground for this petition, appellant respectfully calls the Court's attention to the following material matter of law inadvertently overlooked by the Court as shown by its opinion in this cause:

The Court, by applying the law of the State of Illinois as determinative of this case and in ascertaining that law solely by reference to decisions of the Illinois courts, has overlooked and failed to apply points urged by the appellant, namely, that inasmuch as the appellee neither pleaded nor proved the law of Illinois that such law, even if otherwise applicable (as the Court in its opinion has found) will

be presumed to be the same as the law of Missouri and that the Missouri law as enunciated in the Missouri decisions should control and determine this case for the further reason that the Illinois law is repugnant to the settled public policy of the forum state. This was clearly relied on by appellant in its original brief filed herein. (See Points Relied Upon, Nos. 19 and 20, page 12, of Appellant's Brief; Points and Authorities V, B and C, pages 18-19; and Argument V, B and C, pages 42 to 46.)

The Court, although not alluding to or specifically ruling the point raised by appellants, namely, that federal courts will no longer take judicial notice of the laws of all states but will apply the law of the state of the forum to determine whether or not a foreign law will be judicially noticed or whether it must be pleaded and proven in order to be considered, has, nevertheless, ruled this contention squarely against the appellant by in fact taking judicial notice of the Illinois decisions and in failing to apply the Missouri decisions. This Court has thus violated the rule of **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188** (cited and discussed in appellant's original brief, page 45) and the spirit of that decision as interpreted by the First Circuit in **Sampson v. Channell, 110 F. (2d) 754, 128 A. L. R. 394, 405** (cited by the appellant at the oral argument on this cause), and **is in direct conflict on the specific point here involved** with the decisions of the Third Circuit in the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.**, and **Warfield v. General Finance Co. of Philadelphia, Pa., Inc., 116 F. (2d) 254, l. c. 257.** These last-cited cases, which are on "all fours" with the case at bar and are in direct conflict therewith, were actually decided November 27, 1940, only a few days after the submission of the cause herein. The decisions, however, were unknown to counsel for the appellant until after receipt of the Federal Reporter, dated February 3, 1941, wherein they were first reported. This

issue of the Federal Reporter was received just a few days before the rendering of the opinion herein and were discovered by counsel almost simultaneously with the entry of the opinion herein. The decisions undoubtedly were likewise not available to the Court when the opinion herein was prepared.

The decision and opinion in the case at bar, in applying the law of Illinois when the case was tried in the District Court of Missouri and when the law of Illinois was neither pleaded nor proved, is in direct conflict with the cases last cited, wherein it was held, at page 257:

> "As the accident which inflicted the plaintiff's injuries occurred in Maryland, the law of that state would, under well-settled principles, ordinarily determine the legal incidents of the case. Restatement of the Law, Conflict of Laws, paragraphs 278 and 279. But no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487,** it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See Goodrich, Conflict of Laws (2d Ed.), para. 12. Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

In appellant's original brief it was pointed out that the pertinent rule of law in Missouri is the same as in Pennsylvania, namely, that in the absence of evidence to the contrary the law of another state will be presumed to be the same as the law of Missouri. A number of cases in support of this rule were cited in the original brief, including

Kinsley Bank v. Woods, 61 S. W. (2d) 384 (Mo. A.); Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591, 599; Madden v. Railroad, 192 S. W. 455, 456 (Mo. Sup.); Gordan v. Andrews, 2 S. W. (2d) 809 (Mo. A.). We then argued, based on the foregoing Missouri presumption (original Brief page 45):

> "It is, of course, the clear duty of the Federal Court to follow the Missouri decisions. **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188; Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. ed. 1290.** This includes the application of the Missouri presumption, absent pleading and proof, that the law of Illinois is the same as the law of Missouri."

Wherefore, petitioner prays that the Court will set aside its opinion heretofore rendered and grant said petitioner a rehearing in the cause herein.

Respectfully submitted,

JOHN W. GIESECKE,
HAROLD C. ACKERT,
706 Chestnut St.,
St. Louis, Mo.,
Attorneys for Appellant.

Certificate of Counsel.

John W. Giesecke and Harold C. Ackert, counsel for the appellant in the within and foregoing cause, hereby certify that the foregoing petition for rehearing is filed in good faith and that said counsel believe the same to be meritorious and that said petition is not filed for vexation or delay.

John W. Giesecke,
Harold C. Ackert,
706 Chestnut St.,
St. Louis, Mo.,
Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 21, 1941.

[fol. 102] (Order Denying Petition of Appellant for a Rehearing.)

March Term, 1941.

Thursday, March 27, 1941.

The petition for rehearing of this cause filed by counsel for the appellant having been considered by this Court, It is now here Ordered that the same be, and is hereby, denied.

March 27, 1941.

[fol. 103] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein D'Oench, Duhme & Co., Inc., a Corporation, was Appellant, and the Federal Deposit Insurance Corporation, a Corporation, was Appellee, No. 11,779, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the tenth day of April, A. D. 1941, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of June, A. D. 1941.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7561)

FILE COPY

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FILED
JUN 25 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Eighth Circuit,
and
SUPPORTING BRIEF.

FRANKLIN E. REAGAN,
Boatmen's Bank Building,
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JOHN W. GIESECKE,
HAROLD C. ACKERT,
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St. Louis, Missouri,
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INDEX.

	Page
Petition for writ of certiorari	1–7
Summary statement of matter involved	1
Statement disclosing basis of jurisdiction	5
Questions presented	5
Reasons relied on for the allowance of the writ	6
Prayer for writ	7
Brief in support	9
The opinion of the court below	9
Jurisdiction	9
Statement of the case	9
Specification of errors	10
Argument	11

Cases Cited.

A. B. v. C. D., 36 F. Supp. 85 18

Erie Railroad Co. v. Tompkins, 304 U. S. 64 ... 3, 4, 5, 6, 10

Fidelity Union Trust Co. v. Field, decided December 9, 1940, ... U. S. ..., 85 L. Ed. 176 (Advance Sheets) 16, 19

Franklin Bank v. St. Louis Car Co., 9 S. W. (2d) 901 (Mo. Sup.) 19

Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd., 242 U. S. 430 6

Gate City National Bank v. Schmidt, 168 Mo. App. 153, l. c. 158, 152 S. W. 101 19

Gordon v. Andrews, 2 S. W. (2d) 809 (Mo. App.) 16

Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972 (Advance Sheets) 3, 5, 6, 12, 21

Gunning v. Cooley, 281 U. S. 90, 98 6
Hanley v. Donoghue, 116 U. S. 1 17
Kinsley Bank v. Woods, 61 S. W. (2d) 384 (Mo. App.) 16
Klaxon Company v. Stentor Electric Manufacturing Co., Inc., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets) 3, 6, 11
Kuhn v. Fairmont Coal Co., 215 U. S. 349 14
Madden v. Railroad, 192 S. W. 455, 456 (Mo. Sup.) ... 16
Miller v. Peoples Savings Bank, 193 Mo. App. 489, l. c. 508, 186 S. W. 547 19
Mishawaka Rubber & Woolen Manufacturing Co. v. S. S. Kresge Co., 119 F. (2d) 316 (Advance Sheets) 14
Renaud v. Abbott, 116 U. S. 277 17
Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591, 599 16
Waggaman v. General Finance Co. of Philadelphia, Pa., Inc., and Warfield v. same, 116 F. (2d) 254, l. c. 257 ..... 4, 6, 17
West v. American Telephone & Telegraph Co., decided December 9, 1940, ... U. S. ..., 85 L. Ed. 146 (Advance Sheets) 16, 20

Statutes Cited.

Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925, 43 Stat. 938, U. S. C. A., Title 28, Sec. 347.. 5
Rules of Supreme Court, Rule 38, para. 2..... 6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals,
Eighth Circuit.**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of D'Oench, Duhme & Co., Inc., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

This suit was originally instituted by Federal Deposit Insurance Corporation in the United States District Court for the Eastern Division of the Eastern District of Missouri by filing a complaint in conventional form (R. 3) as a suit on a certain promissory note executed by D'Oench, Duhme & Co., Inc., petitioner herein, in the sum of $5,000.00 and pay-

able to the Belleville Bank & Trust Co. of Belleville, Illinois, as per exhibit attached to the petition (R. 13). The defendant, petitioner herein, in due course filed its answer (R. 6) alleging, among other things, that said note was given to the payee without consideration, that plaintiff was the holder thereof after maturity, and denied that plaintiff was a holder in due course.

Plaintiff filed a reply (R. 10) in the nature of a general denial coupled with a plea of estoppel to assert the defense of no consideration. Defendant's motion to strike the reply was submitted and overruled (R. 9).

The cause came on for hearing November 20, 1939, before the Court sitting without a jury, at which time the parties presented their evidence. Plaintiff did not plead and did not offer any evidence to prove the law of Illinois.

Judgment was rendered January 8, 1940, in favor of plaintiff (R. 72), and findings of fact (R. 66) and conclusions of law (R. 71) were filed by the Court. A motion for new trial (R. 73), asserting among other things the trial court erred in not finding that plaintiff was not a holder in due course, was duly filed January 20, 1940, and overruled February 5, 1940, at which time additional findings of fact and conclusions of law were filed by the Court (R. 75), one of the conclusions of law being that the rights of the parties are governed by the laws of Illinois. An appeal to the United States Circuit Court of Appeals for the Eighth Circuit was duly taken, and the judgment of the lower court was affirmed (R. 94) in an opinion filed February 11, 1941 (R. 87/94), which decided, among other things, that the place of contract was Illinois and that the plaintiff was a holder in due course or had a status equivalent thereto under the law of Illinois.

In reaching the conclusion that the place of contract was Illinois the Court applied the "general" law (R. bottom p.

89, top p. 90). In reaching the conclusion that the plaintiff was a holder in due course, or had a status equivalent thereto, the Court applied solely the law of Illinois as determined from the opinions of the Illinois courts, saying (R. 91):

> "The courts of Illinois appear to have taken the view that, notwithstanding the provisions of the Negotiable Instruments Law and the clause added to Section 29 by the Illinois Legislature, one to whom accommodation paper is negotiated, in good faith and for value, is in the position of, or equivalent to, a holder in due course, whether he acquires title before or after maturity. This construction necessarily is binding on us."

As authority for this statement the Court cited and discussed only Illinois decisions (R. 91/93).

The necessary effect of the decision in this case is:

1. To disregard and violate the principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,** and subsequent cases, and is in conflict with the decisions of this Court in **Klaxon Company v. Stentor Electric Manufacturing Co., Inc., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets),** and **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972 (Advance Sheets),** in that the Circuit Court of Appeals failed to apply the substantive law of the forum state in determining the place of contract.

2. To disregard and overrule the contention of the appellant, petitioner herein, that as the law of Illinois had neither been pleaded nor proved, the case if governed by Illinois law should be decided under the Missouri law, which presumes the Illinois law to be the same as the Missouri law absent pleading and proof thereof. This contention is based upon the applicable rules of law as laid down by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64.** The Circuit Court of Appeals for the Eighth Circuit

made no reference in its opinion to this point raised by the appellant, petitioner herein, in its statement of errors (R. 81/85), but the Court could only have reached the result it did and could only have applied and solely relied upon Illinois law as found in the reported decisions of the Illinois courts by in fact overruling, disregarding and holding against the contention of this petitioner as aforesaid. Appellant's petition for rehearing was filed February 21, 1941 (R. 95/98), and clearly called to the Court's attention this point, but said petition for rehearing was denied on March 27, 1941 (R. 99).

Furthermore, the necessary effect of the decision brings the Circuit Court of Appeals for the Eighth Circuit in direct conflict with the decisions of the United States Circuit Court of Appeals for the Third Circuit in the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc., and Warfield v. same, 116 F. (2d) 254, l. c. 257.** Those cases squarely hold, contrary to the necessary effect of the ruling of the Circuit Court of Appeals for the Eighth Circuit in this case, that:

> "But, no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487,** it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See **Goodrich, Conflict of Laws (2d Ed.), para. 12.** Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

3. To disregard and violate the principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,**

and subsequent cases, and is in conflict with the decision of this Court in **Griffin v. McCoach, ... U. S. , .., 85 L. Ed. 972 (Advance Sheets)**, in that the Circuit Court of Appeals has applied a foreign law repugnant to the substantive law of the state of the forum when the forum state would not apply it.

B.

STATEMENT DISCLOSING BASIS OF JURISDICTION.

1. The original date of the judgment to be reversed is February 11, 1941 (R. 94). Petition for rehearing was filed February 21, 1941, within the time provided for by the rules of the United States Circuit Court of Appeals (R. 98) and the petition for rehearing was denied March 27, 1941 (R. 99).

2. The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A., Title 28, Section 347.

C.

QUESTIONS PRESENTED.

1. Whether a federal court must apply the rule of conflicts of law followed in the state of the forum to determine what law governs the place of contract.

2. Whether the principles of law announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64**, require a Federal District Court to apply the law of the state of the forum to determine whether a foreign law will be judicially noticed or must be pleaded and proved.

3. Whether a federal court may apply a foreign law repugnant to the law of the forum state where the forum state would not apply such law because of repugnance.

4. In the interest of brevity (**Rule 38, para. 2; Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd., 242 U. S. 430**) petitioner does not at this time set forth all of the questions which will be urged in the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (**Gunning v. Cooley, 281 U. S. 90, 98**), petitioner here refers to and incorporates into this petition all of the matters presented in its statement of errors and points relied upon on the appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 81/85) with the same force and effect as if herein set out in full.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Because the decision of the Circuit Court of Appeals for the Eighth Circuit in this case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the two cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.** and **Warfield v. same, 116 F. (2d) 254.**

2. Because the United States Circuit Court of Appeals for the Eighth Circuit has decided important questions of federal law which have not been but should be settled by this Court.

3. Because the Circuit Court of Appeals has decided federal questions in probable conflict with the applicable decisions of this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64,** and subsequent decisions, especially **Klaxon Co. v. Stentor Electric Manufacturing Co., ... U. S. ..., 85 L. Ed. 969** (advance sheets); **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972** (advance sheets).

4. Because the present decision leaves in confusion the question as to whether federal courts will take judicial notice of the laws of all states or whether they will follow the settled law of the state of the forum as to the necessity of pleading and proving the foreign law relied upon.

E.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein applied for should be granted.

FRANKLIN E. REAGAN,
JOHN W. GIESECKE,
HAROLD C. ACKERT,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

BRIEF IN SUPPORT.

I.

THE OPINION OF THE COURT BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals of the Eighth Circuit (written by Johnsen, J.) was filed February 11, 1941, and appears on record pages 87 to 94. It is reported in 117 F. (2d) 491.

II.

JURISDICTION.

The essential facts relative to the jurisdiction of this Court are fully stated in the accompanying petition for certiorari (supra, page 5) and in the interest of brevity are not repeated here.

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari (supra, page 1) and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in determining the place of contract by applying the "general" law rather than applying the law of the forum.

2. The Circuit Court of Appeals erred in determining the Illinois law by solely applying decisions from that state, although the case was tried in the District Court of Missouri and no Illinois law was pleaded or proved.

3 The Circuit Court of Appeals erroneously failed to apply the applicable principles announced by this Court in **Erie Railroad Co. v. Tompkins, 304 U. S. 64**, and improperly took judicial notice of the law of Illinois rather than applying the rule of the state of the forum, Missouri, which clearly provides that where a foreign law is neither pleaded nor proved it will be presumed to be the same as the law of Missouri, and the Court, therefore, erroneously determined the Illinois law from the Illinois decisions rather than the Missouri decisions.

4. The Circuit Court of Appeals erred in applying a foreign law repugnant to the substantive law of the forum state.

5. The Circuit Court of Appeals erred in holding that under the applicable law the endorsee of the note sued on, given for the accommodation of the payee and negotiated more than five years after its execution, was a holder in due course.

6. The Circuit Court of Appeals erred in affirming the judgment for the plaintiff.

V.

ARGUMENT.

1.

At the very outset the Court of Appeals was called upon to determine whether the note sued on in this case was an Illinois or a Missouri contract. The Court of Appeals decided this question by applying the "general" law (R. bottom p. 89, top p. 90) and made no attempt to apply the law of Missouri, the forum state, to determine the place of contract. Not a single Missouri case was cited or referred to on this point; for that matter, not a single Missouri case was cited or referred to in the entire opinion.

That the procedure followed by the Circuit Court of Appeals which determined the place of contract by "general" law rather than the law of Missouri, the forum state, is clearly erroneous has now been settled beyond any question of doubt by the recent decision of this Court in **Klaxon Co. v. Stentor Electric Manufacturing Co.**, decided June 2, 1941, ... **U. S.** ..., **85 L. ed. 969** (Advance Sheets). In that case the District Court sitting in Delaware had decided an important question in the case and determined that the New York law was applicable, but apparently followed its independent determination of the "better view of the law" without regard to the Delaware law, for no Delaware decisions or statutes were cited or discussed (as no Missouri decisions or statutes were cited or discussed in the instant case by the Court of Appeals). This Court unequivocally ruled such procedure erroneous, saying, at page 971 (Advance Sheets, supra):

> "We are of opinion that the prohibition declared in **Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487**, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws

rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. See **Erie R. Co. v. Tompkins, supra, at 74-77.** Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. * * * This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. **Funkhouser v. J. B. Preston Co., 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134.** And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

This Court similarly held in **J. Rob Griffin, Admr., v. McCoach,** decided June 2, 1941, ... **U. S.** ..., **85 L. ed. 972** (Advance Sheets). In that case a federal court in Texas had decided that the insurance contract in suit was governed by the laws of New York, but, as this Court pointed out, the question as to whether the changes made in the insurance contract left its governing laws unaffected was made by "applying rules of law in a way which may or may not have been consistent with Texas decisions." Further, this Court pointed out that the opinion did not "rest its conclusions upon its appraisal of Texas law or Texas decisions but upon decisions of this Court inapplicable to this situation in light of Erie R. Co. v. Tompkins." Accordingly the case was reversed and remanded for a determination of Texas law.

The principles announced in the foregoing cases are entirely applicable to the case at bar. In fact, the Court of Appeals unquestionably had in mind that the Erie case required application of substantive state law, for it held that the construction of the Illinois courts "necessarily is binding on us" (R. 91). However, it clearly overlooked

the fact that in determining the first question, namely, the place of contract, the rule of conflicts of law as announced by the Missouri courts is determinative of the initial question in this case, as required by the Erie case. No distinction whatever exists between the cases except that in the cases quoted, as well as the Erie case, jurisdiction was invoked under the applicable federal statute giving the federal court jurisdiction because of diversity of citizenship. Jurisdiction in the present case is governed by U. S. C. A., Title 12, Section 264 (j) (Fourth), which permits the plaintiff corporation to sue or be sued in any state or federal court. The situation is indistinguishable on principle from the diversity of citizenship jurisdiction. In both cases both state and federal courts have concurrent jurisdiction. In this situation the spirit of the Erie and subsequent cases calls for a uniformity of decision so as not to "disturb equal administration of justice in coordinate state and federal courts sitting side by side."

It seems from a careful study of the Erie case that the fundamental principle announced by this Court is that the federal courts do not have the power to declare rules of decision in the broad field of "general" law, for this Court has said that the unconstitutionality of the course pursued pursuant to the decision in Swift v. Tyson "has now been made clear," and further that

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. * * * There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts" (l. c. 78). (Emphasis supplied.)

In the case at bar the first question of general law for determination is, "What is the place of contract?" Obvi-

ously this question does not present any matter "governed by the Federal Constitution or by Acts of Congress."

The Erie case, though one involving diversity of citizenship, goes into more basic propositions of law for the rule upon which the decision in that case is reached and announces the broad principle that the federal courts are without the constitutional authority to declare rules of decision in the broad field of "general" law. As pointed out by Mr. Justice Holmes in **Kuhn v. Fairmont Coal Co., 215 U. S. 349**, and as referred to by this Court in the decision in the opinion of the Erie case (l. c. 79), the fallacy underlying the rule declared in Swift v. Tyson is in the assumption

> "that federal courts have the power to use their judgment as to what the rules of common law are, there being no federal general common law."

There is, therefore, nothing except state law to which the federal courts may refer for a determination of the questions presented in this case which arose with respect to a note originally given by a citizen of Missouri to a citizen of Illinois and which later came to the plaintiff through pledge and foreclosure. That being so, it is unimportant whether jurisdiction in the federal court is invoked by reason of diversity of citizenship or on some other basis giving the state and federal courts co-ordinate jurisdiction.

This view of the principles of the Erie case is held by the United States Circuit Court of Appeals for the Sixth Circuit. That Court, in **Mishawaka Rubber & Woolen Manufacturing Co. v. S. S. Kresge Co., 119 F. (2d) 316** (Advance Sheets), a case in which no diversity of citizenship appears, jurisdiction resting on another act of Congress (the trade-mark statutes), said:

"The registration of appellant's trade-marks did not enlarge its substantive rights. All it did was to confer jurisdiction upon the court regardless of diversity of citizenship and give registrant certain procedural advantages (citing cases).

"Whatever substantive rights appellant may have in the premises arises under local law and are within the scope of **Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487; Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 59 S. Ct. 109, 83 L. ed. 73.**"

As in the case at bar, jurisdiction of the state and federal courts was concurrent or co-ordinate, but not by reason of diversity of citizenship.

2.

The Court of Appeals having ruled the place of contract was Illinois, then ascertained the law of Illinois by taking judicial notice of various decisions of the Illinois appellate courts and held that under such Illinois decisions the plaintiff endorsee had the status of a holder in due course. That such was the process by which the Court ascertained the Illinois law is self-evident, for in the first place the Court's opinion (R. 87-94) not only so states, but it cites and relies solely upon Illinois decisions although no Illinois decisions or laws were pleaded or proved by the plaintiff at the trial of the case which was held in the District Court of Missouri.

The Court applied the Illinois decisions to a final determination of the merits, saying that "no matter how illogical or ill-considered" (R. 93) the Illinois cases may be, they were necessarily binding upon the federal court despite the fact that "* * * the construction of the Negotiable Instruments Law made by the Illinois courts represents a minority American viewpoint * * *."

The question as to whether a state will require pleading and proof of a foreign law is one upon which the courts of the forty-eight states are not in agreement. However, it has long been the substantive law in Missouri that the courts of that state will not take judicial notice of the law of any foreign state; that such law must be pleaded and proved if a party expects to rely thereon, and that a foreign law which has not been pleaded or proved will be presumed to be the same as the law of Missouri. See **Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591, 599; Madden v. Railroad, 192 S. W. 455, 456 (Mo. Sup.); Kinsley Bank v. Woods, 61 S. W. (2d) 384 (Mo. App.); Gordon v. Andrews, 2 S. W. (2d) 809 (Mo. App.) (Illinois law involved).**

There is no question but that if this case had been tried in the state court in Missouri under the identical record here presented, and even if the Missouri Court had reached the conclusion under the Missouri law that this was an Illinois contract, governed by the laws of Illinois (as did the Circuit Court of Appeals, although not by application of Missouri law), the Missouri court would have ascertained the Illinois law, not from the Illinois decisions, but from the Missouri decisions, for the reason that the Illinois law not having been pleaded or proved would be presumed to be the same as the Missouri law. The fundamental purpose and ruling of the Erie and subsequent cases was to bring a uniformity of decisions between state and federal courts within the same forum and to prevent different results being reached in the same case depending upon whether the cause was tried in the state or the federal court. (**West v. American Telephone & Telegraph Co.**, decided December 9, 1940, . . . **U. S.** . . ., **85 L. Ed. 146** [Advance Sheets], and **Fidelity Union Trust Co. v. Field**, decided December 9, 1940, . . . **U. S.** . . ., **85 L. Ed. 176** [Advance Sheets].) It seems self-apparent that upon the rec-

ord in this case a proper application of the doctrine of the Erie case would require the District Court and the Circuit Court of Appeals to disregard the Illinois decisions and to decide this case solely upon the Missouri decisions.

This Court prior to the decision in the Erie case uniformly applied the very rule for which we are contending to cases which came to this Court on writ of error or certiorari from a state court (see: **Hanley v. Donoghue, 116 U. S. 1; Renaud v. Abbott, 116 U. S. 277**), although this Court did not apply the rule in cases coming up through the federal courts for the reason that it was then the accepted rule of "general" federal law that the federal courts took judicial notice of the laws of all states. However, the Erie case held there was no "general" federal law. Therefore, the rule of state law applicable in a particular forum must be applied in all cases where there is concurrent jurisdiction of both state and federal courts, as here.

The United States Circuit Court of Appeals for the Third Circuit has held exactly as petitioners in this case contend. In two cases recently presented to that court which are on "all fours" with the case at bar, the Third Circuit has decided the identical point in a directly contradictory fashion to the necessary implication of the decision in this case. In the cases of **Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.**, and **Warfield v. same, 116 F. (2d) 254**, the Court held, l. c. 257:

> "But, no proof of the law of Maryland was introduced at trial in the District Court (E. D. Pa.). In further effectuation of the policy of federal jurisprudence enunciated in **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487**, it would seem proper for a federal court to follow the rule of the state of the forum on a question of conflict of laws. See **Goodrich, Conflict of Laws (2d**

Ed.), para. 12. Accordingly, we resort to the pertinent rule of law of Pennsylvania, the forum state of the trial court. There it is well settled that, in the absence of evidence to the contrary, the common law of another common-law state is presumed to be the same as the common law of Pennsylvania (citing cases)."

The Waggaman case has recently been referred to with apparent approval by this Court in the Klaxon case, supra, and has been followed by at least one lower federal court. See **A. B. v. C. D., 36 F. Supp. 85.** The law of Missouri is the same as the law of Pennsylvania, namely, that in the absence of evidence to the contrary the law of a foreign state will be presumed to be the same as the law of the forum. In the Waggaman case the Court held that the cause of action was controlled by the law of Maryland, but inasmuch as the law of Maryland had not been pleaded or proved, the Pennsylvania decisions were solely used and applied, because under the Pennsylvania rule the Maryland law was presumed to be the same as the law of Pennsylvania. The federal court was not privileged to take judicial notice of what the Maryland decisions might actually have held, but was bound by the fundamental rule of the state of the forum and the presumption thereby created.

It is self-evident that although the Eighth Circuit did not rule this point in specific language, nevertheless that circuit does not consider pleading and proof of a foreign law necessary in a federal court and will continue to take judicial notice of a foreign law despite the substantive law of the forum state requiring pleading and proof. This, therefore, creates a direct conflict of authority between the views entertained by the Third Circuit and the Eighth Circuit.

Not only is a novel question presented on which there

has now developed a direct conflict in the position taken by two United States Circuit Courts of Appeals, but an important question of federal law is presented which has not been, but should be, settled by this Court. It is obviously important that litigants and federal practitioners know with certainty at the earliest possible moment whether they must plead and prove foreign laws when they expect to rely upon them (as held by the Third Circuit) or whether the old rule of taking judicial notice will apply despite the Erie and subsequent decisions (as is the necessary effect of the decision of the Eighth Circuit in this case). The present decision not only creates an irreconcilable conflict with the decision of the Third Circuit but leaves in confusion this important question presented in this case.

It is pertinent to here point out that, had the Missouri decisions been applied in this case, the result on the merits would have been exactly contrary, for, even though the Illinois law be as the Court of Appeals found, it is directly contrary to the Missouri law that a demand note executed more than five years previously is past due and one acquiring a past-due note is not a holder in due course. See **Franklin Bank v. St. Louis Car Co., 9 S. W. (2d) 901 (Mo. Sup.); Gate City National Bank v. Schmidt, 168 Mo. App. 153, l. c. 158, 152 S. W. 101; Miller v. Peoples Savings Bank, 193 Mo. App. 489, l. c. 508, 186 S. W. 547.**

That the Erie case intended the result reached in a federal court sitting in Missouri would be identical with the result reached in the same case had it been tried in the state court of Missouri is made unquestionably apparent by the subsequent decisions of this Court. In **Fidelity Union Trust Co. v. Field**, decided December 9, 1940, ... **U. S. ..., 85 L. ed. 176 (Advance Sheets)**, Mr. Chief Justice Hughes concluded the unanimous opinion of this Court by saying (l. c. 179):

"The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

To the same effect see **West v. American Telephone & Telegraph Co.**, supra.

It has already been demonstrated that, had this case been tried in the state court of Missouri on the identical record here presented, the Missouri court, because of the failure to plead and prove the law of Illinois, would have presumed that law to be the same as the Missouri law and would, therefore, have determined the Illinois law by solely looking to the Missouri decisions; that, had the Missouri decisions rather than the Illinois decisions been applied, the result on the merits would have been directly opposite, as the plaintiff could not possibly have prevailed in the Missouri court. The entire result of this case is, therefore, directly opposite from what it would have been had the case been tried in a Missouri court, where it could have been tried. This is entirely out of harmony with and directly contrary to the spirit of the Erie case and the express rulings and theory of the cases above cited and quoted and is as afore pointed out in direct conflict with the rule on the specific point announced by the Third Circuit.

3.

The petitioner, defendant below, argued before the Circuit Court of Appeals (R. 95-96) that, regardless of whether this was an Illinois contract and regardless of whether the Illinois law was before the Court, no view of the law directly opposite and actually repugnant to the Missouri rule

should be applied by the federal court because a Missouri court would not enforce a repugnant foreign law, particularly against one of its own citizens, and a federal court sitting in the same state should not apply such a law. This conclusion flows inescapably from the Erie case and from the subsequent decisions which make clear that the result achieved in the federal court should be the same as would have been achieved in the state court in all cases where the two courts have concurrent jurisdiction. The Erie and subsequent cases require that the substantive law of the state be applied and, where that substantive law would prevent the application of a foreign law because of repugnancy, even if properly pleaded and proved, then the federal court must apply such state law. The Court of Appeals failed to determine whether a Missouri court would in fact refuse to apply the Illinois law because of repugnancy. In so failing to determine, the Circuit Court of Appeals disregarded its basic duty under the doctrine of the Erie and subsequent cases and is in direct conflict with the subsequent ruling of this Court in **Griffin v. McCoach, ... U. S. ..., 85 L. Ed. 972 (Advance Sheets).**

4.

It is respectfully submitted that the writ of certiorari should be issued.

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Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206.

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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CASES CITED.

Page

Board of Commissioners v. United States, 308 U. S. 343, 350, 352 4

Davies County Bank v. Grantham, 13 S. W. (2d) 1079, 1081 (Mo. A.) 2

Deitrick v. Greaney, 309 U. S. 190 4

Farmers Bank v. Harris, 250 S. W. 946, 950 (Mo. A.) .. 2

Ford v. Ford Roofing Co., 285 S. W. 538, 541 (Mo. A.) 2

Klaxon Co. v. Stentor Electric Mfg. Co., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets) 3

Lyon v. Mutual Benefit Health & Accident Assoc., 305 U. S. 484 3

Massa v. Huehnerhoff, 59 S. W. (2d) 723 (Mo. A.) 2

Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 119 F. (2d) 316 (Advance Sheets) 2

Peoples Bank of Ava v. Rankin, 220 Mo. A. 205, 282 S. W. 91 5

Peoples Bank v. Yager, 221 Mo. A. 955, 288 S. W. 954 .. 2

Royal Indemnity v. United States, ... U. S. ..., 85 L. Ed. 888 (Advance Sheets) 4

Trautman v. Schroeder, 230 Mo. A. 985, 93 S. W. (2d) 303 5

Waggaman v. General Finance Co. of Philadelphia, Inc., 116 F. (2d) 254 ..... 2, 3, 4

Williams v. Kessler, 295 S. W. 482 (Mo. A.) 5

Statute Cited.

28 U. S. C. A. 724 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206.

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

1.

The Respondent, although admitting that the court below determined the place of contract by application of the Illinois law rather than the forum law of Missouri (Respondent's Brief page 6), attempts to excuse the error on the ground that it was "harmless" by contending that "the rule applied is in fact the same as that of the Missouri courts." The quoted contention, however, is purely a conclusion of the Respondent and is not in accord with the contention of the Petitioner which denies that the Missouri rule is the same. The Petitioner is entitled to the Court's, rather than Respondent's, opinion determining

the forum law. Respondent, in asserting that it does not understand that Petitioner claims the Missouri rule is different than the Illinois rule relied upon by the Court of Appeals, has apparently overlooked Petitioner's contention that it is well established in Missouri that a renewal of an accommodation note in no wise enlarges the rights of the parties when it is given without consideration and in no way changes the rights under the original note. In this case the original notes were executed in Missouri and made payable at the office of the maker in Missouri (R. 57-9). The Missouri rule is indisputable that all defenses that were available against the original accommodation note are available against renewal notes. **Massa v. Huehnerhoff, 59 S. W. (2d) 723 (Mo. A.); Farmers Bank v. Harris, 250 S. W. 946, 950 (Mo. A.); Davies County Bank v. Grantham, 13 S. W. (2d) 1079, 1081 (Mo. A.); Peoples Bank v. Yager, 221 Mo. A. 955, 288 S. W. 954; Ford v. Ford Roofing Co., 285 S. W. 538, 541 (Mo. A.).** This being true, Petitioner contends that the Missouri court in determining the place of contract would be governed by the terms of the original notes which clearly were subject to the defenses interposed by the Petitioner under the Missouri law, and would not enlarge Respondent's rights, because renewal notes were given without the slightest consideration therefor.

2.

With respect to the second question presented, Respondent argues that **Waggaman v. General Finance Co. of Philadelphia, Inc., 116 F. (2d) 254**, is not in conflict with the case at bar, for the reason that federal jurisdiction in the instant case was not invoked on the ground of diversity of citizenship.[1] Clearly, Respondent misconceives the

[1] That this affords no basis of distinction is clear from the decision in **Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 119 F. (2d) 316 (Advance Sheets)**, wherein the Circuit Court of Appeals of the Sixth Circuit applied the fundamental principle of the Erie case in a case where jurisdiction was not based on diversity of citizenship.

rule of the Erie case which formed the basis of the Waggaman decision. The rule in the Erie case requiring application of local law was not bottomed upon the premise of diversity of citizenship, but rather it rests upon the fundamental proposition that the federal courts are without authority from Congress (and, in fact, that Congress is without constitutional power to grant authority) to set up a "Federal general common law." Respondent (its Brief, page 2) and the Eighth Circuit Court of Appeals (R. 87) concede that the primary question for determination is whether the Illinois or Missouri law applies. This Court has clearly announced in Klaxon Co. v. Stentor Electric Mfg. Co., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets), that the prohibition declared in the Erie case against independent determinations of the common law by the federal courts extends to the field of conflict of laws. It is a matter of substantive law as to whether a court will take judicial notice of the laws of foreign states,[2] and the federal courts, in determining a conflict of law question, must apply the common law of the forum state. It is the law in Missouri that absent pleading and proof of the foreign law, such law is presumed to be the same as the law of the forum.

The Erie case specifically rules that there is no "Federal general common law" with respect to matters of substantive law, and the Conformity Act clearly requires the district courts to follow the state law on procedural matters. The question here presented is one of substantive law (as it was so treated in the Waggaman case) and the

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2 Respondent seems to suggest that whether the foreign law must be pleaded and proved is a procedural rule. Respondent is mistaken, but if it were a procedural rule the same result would be reached, for then the matter would be governed by the Conformity Act, 28 U. S. C. A. 724 (see Lyon v. Mutual Benefit Health & Accident Assoc., 305 U. S. 484), which expressly provides "The practice, pleadings, and forms and modes of proceeding in civil causes * * * in the district courts shall conform" as nearly as practicable with that in the state courts of the forum. There is nothing in the New Federal Rules which would supersede the requirements of the Conformity Act on this subject.

decision in the case at bar applying as it did "general law" rather than Missouri law is squarely in conflict with that of the Circuit Court of Appeals for the Third Circuit in the Waggaman case.

The three cases to which Respondent refers as indicating that the rule in the Erie case "is probably not applicable in a suit to which the United States is a party" are clearly inapplicable and suggest a contrary inference. In each of those cases this Court specifically stated that federal statutes or treaties were involved, and that no local common law applied, thus indicating that had local common law been applicable, as in the case at bar, it would have been applied.[3]

In the case at bar the note sued on and all prior notes were given by a Missouri citizen to an Illinois state bank and, as it must be admitted by the Respondent, the rights of the parties are governed either under the law of Missouri or under the law of Illinois.

3.

Respondent's third argument is based upon the proposition that Respondent's statement of the Missouri rule is the law under the facts in this case. Respondent refers to

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[3] In **Board of Commissioners v. United States, 308 U. S. 343, 350, 352,** this Court clearly says:

> "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, Treaties or Statutes of the United States, and does not owe its authority to the law making agencies of Kansas."

In **Royal Indemnity v. United States, ... U. S. ..., 85 L. ed. 888 (Advance Sheets),** this Court said:

> "The rule governing the interest to be recovered as damages * * * is not controlled by state statute or local common law."

In **Deitrick v. Greaney, 309 U. S. 190,** this Court said (l. c. 198):

> "The doctrine with which we are now concerned * * * is a principle which derives its force from the circumstances that respondent's act * * * is itself a violation of the statute * * *" (referring to the National Bank Act).

So there were no questions of local common law involved in those cases.

the note here sued on as a "negotiable instrument." The original notes were negotiable instruments and Missouri contracts, and Petitioner contends that the rights of the parties were governed by those notes under the Missouri law; the renewal note sued on shows on its face (R. 13) that it wasn't a negotiable instrument. Petitioner contends that it is entitled to a court determination as to whether it is against the public policy of Missouri to hold a citizen of Missouri liable on an accommodation note under the facts in this case, particularly so as there was a specific agreement not to sue, and that forbearance agreement constitutes a complete defense under the law of the forum. **Trautman v. Schroeder, 230 Mo. A. 985, 93 S. W. (2d) 303; Williams v. Kessler, 295 S. W. 482 (Mo. A.); Peoples Bank of Ava v. Rankin, 220 Mo. A. 205, 282 S. W. 91.**

4.

It is respectfully submitted that the writ of certiorari should issue.

FRANKLIN E. REAGAN,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC.,
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN W. GIESECKE,
HAROLD C. ACKERT,
Counsel for Petitioner.

Cases Cited.

	Page
Black & White Taxicab v. *Brown & Yellow Taxicab*, 276 U. S. 518	3
Chicago Title & Trust Co. v. *Brady*, 165 Mo. 197	5
Farmers Bank v. *Harris*, 250 S. W. 946	5
Federal Chemical Co. v. *Hitt*, 155 S. W. (2d) 987	2
Griffin v. *McCoach*, 313 U. S. 498	4
Hansen v. *Duvall*, 62 S. W. (2d) 732	2
Ruhe v. *Buck*, 124 Mo. 178	4
Smoot v. *Judd*, 161 Mo. 673	2
William v. *Haines*, 27 Iowa 251	4

Statutes Cited.

R. S. Mo. 1929, Sec. 806	3
R. S. Mo. 1939, Sec. 3044	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

Petitioner, in the belief that the questions here for decision were succinctly stated in its Petition for Certiorari, its supporting and reply briefs, had not intended filing any further brief herein, however, on January 6, 1942, respondent filed its 62-page brief, copy of which petitioner received on January 7, 1942. The petitioner, feeling that respondent's brief has incorrectly stated some of the facts, has overlooked at least one of petitioner's principal points and has misconceived much of the Missouri law it has cited, has prepared this short reply brief.

I.

Respondent has attempted to excuse the error of the court below in admittedly failing to apply the Missouri con-

flicts of law rule by asserting that the error was "harmless," claiming that the court below actually applied the same rule that a Missouri court would have applied. This bold assertion overlooks the fact that petitioner insists that under the Missouri rule of conflicts of law the renewal note sued on would be construed to be a Missouri contract and subject to all of the defenses urged by petitioner. See *Hansen* v. *Duvall*, 62 S. W. (2d) 732 (Mo. Sup.) *l. c.* 738, and cases cited in petitioner's reply to respondent's brief in opposition to Petition for Certiorari, p. 2. This rule has just been reaffirmed by the Springfield Court of Appeals on November 19, 1941, in *Federal Chemical Co.* v. *Witt*, 155 S. W. (2d) 897, *l. c.* 902 (advance sheets) where the court said "a renewal of a note issued for accommodation is subject to the same defense as the original note (citing Missouri cases)."

Respondent also confuses the issue with respect to the Missouri law by saying that the original notes were delivered to the payee in Belleville, Illinois (Resp. brief, p. 4). Actually the testimony does not support such statement (See R. 48, where the only evidence on the matter shows that it was unknown where or how the original note was delivered). However, even if the note had been delivered in Illinois it would still have remained a Missouri contract. *Smoot* v. *Judd*, 161 Mo. 673.

Further respondent states that the court below found it to be "a holder in due course." What the court actually held was that respondent occupied a position *under the Illinois law* "equivalent to a holder in due course." (Italics supplied.)

II

Respondent's brief in discussing the question of judicial notice has failed to meet petitioner's argument that a ques-

tion of substantive law is involved. Furthermore, in its discussion of the applicability of the *Erie* case it has disregarded the basic principle therein announced, namely, that there is no Federal general common law and that previous creation of such a body of law was beyond the constitutional power of the Federal courts.

That the law of judicial notice is part of the substantive law seems to flow from Mr. Justice Holmes admirable dissenting opinion in *Black & White Taxicab* v. *Brown & Yellow Taxicab*, 276 U. S. 518, for there he said that general law means "matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law."

It is obvious that the question of judicial notice is not governed by a law of the United States.

R. S. Mo. 1929, sec. 806 cited by respondent (Resp. brief p. 1) is simply a rule of evidence dispensing with proof of a foreign law *only if it is pleaded*. Clearly it is not a rule of pleading as respondent seems to argue. While it could be argued that under the new Federal Rules of Procedure it would not be necessary to plead a foreign law but that would not eliminate the common law requirement of Missouri that it must be proved if not pleaded. The situation is analogous to the contributory negligence cases. The State substantive law is still applicable and must be applied irrespective of the pleading requirements of the Rules of Civil Procedure.

III.

It is interesting to note that respondent in its brief has totally omitted any reference to question 3 presented by the Petition for Certiorari (Pet. p. 5); namely, that Illinois law could never be applied in this case because said law as

determined by the court below is repugnant to the settled current of the Missouri decisions and statutes. This omission is understandable in light of the failure of the court below to consider the point based upon Missouri decisions and in light of the authoritative subsequent decision of this Court in *Griffin* v. *McCoach*, 313 U. S. 498, requiring Federal Courts to respect and apply the forum law in all conflicts cases where the foreign law (if it would otherwise be applied by the forum) is repugnant to that of the forum.

It cannot be controverted that the Missouri Statute (R. S. 1939 sec. 3044) makes "absense or failure of consideration (is) a matter of defense as against any person not a holder in due course * * *". Iowa has a similar statute and the Missouri Supreme Court in *Ruhe* v. *Buck*, 124 Mo. 178 bodily adopted the rule stated in *William* v. *Haines*, 27 Iowa 251. That case was an action on a sealed instrument executed in Maryland. Under Maryland law the consideration could not be required into but the Iowa status provided that the want or failure in whole or in part of the consideration of a written contract might be shown as a defense. The court held that the consideration could be impeached in an action in Iowa saying "the plaintiff must take such remedy as our laws afford him. He has not a vested right in the courts of other States to all the common law incidents of contracts, provided the obligation be not impaired." The Missouri rule as stated in the syllabus of the case said "the spirit of comity does not require that a non-resident shall be allowed a remedy which is by the policy of the State law denied to its own citizens."

Furthermore in the recent case of *Federal Chemical Co.* v. *Hitt*, *supra*, the Missouri court said "the fact, if a fact, that the maker of a note signed the note merely as an accommodation to the named payee is *always* a defense against the payee or anyone taking from the payee after maturity

of said note." (Italics supplied.) *See also: Chicago Title & Trust Co.* v. *Brady*, 165 Mo. 197, and *Farmers Bank* v. *Harris*, 250 S. W. 946 (Mo. app.)

IV.

Respondent's estoppel theory is wholly without merit either under the Federal or Illinois law. Respondent's brief fails to disclose that at the trial petitioner moved to strike respondent's reply pleading estoppel (R. 9).

In the first place the acts claimed to constitute estoppel occurred before the Federal Act cited by respondent was passed and before the beginning of the corporate existence of the respondent. Furthermore the Bank remained solvent for more than five years after the note sued on was given and for more than three years after it was charged off by the Bank. The note showed on its face that it was non-negotiable and at the time the Bank closed was in default of ten semi-annual interest payments and in default as to principal. (This, under Missouri law charged respondent with notice of defenses.) Furthermore, although it was executed by a duly licensed brokerage house, a member of the St. Louis Stock Exchange, the Bank, three years prior to its failure and while still solvent, had charged the note off (although it was apparently a good and collectible note unless it was subject to some defense). It was probably charged off at the suggestion of the respondent and certainly with its knowledge.

Under these facts petitioner can hardly see how it could be seriously urged that estoppel should apply. Furthermore respondent's own witness testified that even if the note had not been in the Bank they would still have insured and otherwise handled the matter as they did when the Bank failed (R. 62, 63).

Obviously respondent was not damaged. The asserted estoppel is wholly without substance.

Respectfully submitted,

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AUG 6

No. 206

In the Supreme Court of the United States

OCTOBER TERM, 1941

D'OENCH, DUHME & CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, A
CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Bankers Trust Co. v. *Tex. & Pac. Ry.*, 241 U. S. 295	8
Board of Commissioners of Jackson Co. v. *United States*, 308 U. S. 343	9
Davis v. *McColl*, 170 Mo. App. 198	6
Deitrick v. *Greaney*, 309 U. S. 190	9
Erie R. Co. v. *Tompkins*, 304 U. S. 64	8, 9
Federal Bank v. *Mitchell*, 277 U. S. 213	8
Hanley v. *Donoghue*, 116 U. S. 1	8
Johnson v. *Gawtry*, 83 Mo. 339	6, 9
Klaxon Co. v. *Stentor Elec. Mfg. Co.*, No. 741, decided June 2, 1941	7
Long v. *Long*, 141 Mo. 352	6
Mills v. *Green*, 159 U. S. 651	8
Pacific Railroad Removal Cases, 115 U. S. 1	8
Royal Indemnity Co. v. *United States*, No. 817, decided May 26, 1941	9
Waggaman v. *General Finance Co.*, 116 F. (2d) 254	7, 9
Statute:	
Act of February 13, 1925, sec. 12, 43 Stat. 936, 941 (28 U. S. C. sec. 42)	8
Sec. 12 B Federal Reserve Act, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162, 168, 172 (12 U. S. C. 264 (a), (j))	11
12 U. S. C. 264 (d)	9
12 U. S. C. 290	9

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OPINIONS BELOW

The judgment of the District Court of the United States for the Eastern District of Missouri (R. 72) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 87–94) is reported in 117 F. (2d) 491.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on February 11, 1941 (R. 94).

A petition for rehearing was denied on March 27, 1941 (R. 99). The petition for a writ of certiorari was filed June 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent brought suit in the federal court in Missouri on an accommodation note made in Illinois. Applying Illinois law, the court below held for respondent. The questions are:

1. Whether the failure expressly to find the Missouri rule as to choice of law is error when the rule applied is in fact the same as that of the Missouri courts.

2. Whether the federal district court, in an action instituted by a corporate agency of the United States, must adopt the local rule that the laws of other states must be alleged and proved.

3. Whether respondent's recovery is repugnant to the public policy of Missouri.

STATUTE INVOLVED

The applicable portions of the statute involved are set forth in the Appendix.

STATEMENT

The respondent, Federal Deposit Insurance Corporation, brought suit in the United States District Court for the Eastern District of Missouri upon a promissory note executed by the petitioner

in the sum of $5,000 (R. 3–4). The note had been assigned by the payee, Belleville Bank & Trust Company, to the respondent (R. 13). The petitioner answered, alleging that the note was accommodation paper given to the named payee without consideration, that the respondent had acquired title to the note after maturity, and was not a holder in due course (R. 6–9). The facts as found by the District Court are substantially as follows:

The note in suit, dated Belleville, Illinois, January 1, 1933, was in the principal sum of $5,000, bearing interest at the rate of 6 per cent. Protest, presentation, and notice were waived, and the note was payable at the office of the Belleville Bank & Trust Company, Belleville, Illinois. (R. 66–67).

On or about April 2, 1938, the bank borrowed from respondent the sum of $1,349,558.07, pledging certain collateral as security therefor, including the note here involved (R. 67), which was indorsed without recourse by the bank to the order of the respondent (R. 67). Thereafter, the bank failed to pay its loan to the respondent on demand, and, under the terms of the loan, respondent was empowered to collect in its own name all collateral securing the debt (R. 67). In August, 1938, the respondent made demand upon petitioner for payment of the note in suit (R. 67). Payment was refused and respondent was advised that the note had been given without consideration, petitioner

basing its refusal upon the following facts (R. 67, 71):

In 1918 and 1920, petitioner sold to the bank drainage district bonds in the amount of $5,000, which matured August 1, 1926. Upon maturity, the bank forwarded the bonds to the petitioner to be presented for payment, and the bonds were dishonored by reason of no funds. The cashier of the bank then requested petitioner to execute two notes payable to the bank in the respective amounts of $2,000 and $3,000, which would enable the bank to carry the notes and not show any past due bonds in the bank. Petitioner executed two collateral demand notes, each dated August 1, 1926, and payable to the bank. One of the notes was for $2,000, bearing 6 per cent interest from date; the other note was for $3,000, bearing interest at 5½ per cent. The collateral agreement of each note recited that the corresponding amount of the defaulted drainage district bonds were pledged as collateral. (R. 68.) Under date of August 4, 1926, the Belleville Bank & Trust Company, by its assistant cashier, acknowledged in writing receipt of the two demand notes. There was appended to each of the receipts the following statement: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." These receipts were not attached to the notes, but were delivered to the petitioner and kept in its possession at all times since. (R. 69.) A search of the

records of the bank in August, 1938, failed to disclose any copies of these receipts (R. 69).

From August, 1926, until March, 1932, petitioner paid the bank interest amounting to $1,601.56. The interest payments were made so as to keep the two notes as live paper (R. 69–70). One or more renewal notes were given prior to the execution of the note upon which suit was brought (R. 70). At the time of the execution of the note in suit, a representative of the bank requested petitioner to execute a new note as the other note or notes had become too old, and accordingly the note of January 1, 1933, was signed (R. 70). On July 30, 1937, $2,000 of the defaulted bonds were sold for $100, and that amount was credited to interest due on the note (R. 70). The note in question was listed as a charged-off asset by the Belleville Bank & Trust Company on July 29, 1935 (R. 70).

The District Court, after finding the foregoing facts, held as a conclusion of law that the respondent was an innocent holder in good faith and for value, that the defense of lack of consideration was not proved to the satisfaction of the court, and that under the facts of the case the petitioner was estopped to assert lack of consideration (R. 71). Thereafter, the court entered additional conclusions of law holding that the note sued on constituted a new contract between the parties, and that the rights of the parties on the notes were governed by the law of the State of Illinois (R. 75). It there-

upon entered judgment for the respondent in the sum of $5,000, with interest thereon from May 1, 1933, and 10 per cent of the principal as attorney fees, making the total judgment $7,376.41 (R. 71–72). On appeal the Circuit Court of Appeals for the Eighth Circuit affirmed, holding that the note was governed by the law of the State of Illinois, and that under the applicable Illinois law the indorsee of a demand note given for the accommodation of the payee and negotiated after maturity, has the status of a holder in due course.

ARGUMENT

1. Petitioner contends (Pet. 11–15) that the court below, in determining what law governed petitioner's obligation as accommodation maker, failed specifically to find and follow the Missouri rule as to choice of law.

While the court below did not specifically refer to the Missouri rule as to the choice of the law which should govern petitioner's obligation, it followed (R. 89) the applicable Missouri rule. In Missouri, as generally, it is well settled that the state in which a note is made payable and in which it is delivered is the place of the contract, and that the obligation of the note is governed by the laws of that state. *Johnson* v. *Gawtry,* 83 Mo. 339, 343; *Long* v. *Long,* 141 Mo. 352, 372–373; *Davis* v. *McColl,* 179 Mo. App. 198, 202, 207. We do not understand petitioner to contend that the Missouri rule is otherwise.

The decision below is not in conflict with *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, No. 741, decided June 2, 1941. The *Klaxon* case, decided after the decision below, held that the federal courts, in cases where jurisdiction depends upon diversity of citizenship, must apply the forum's rule of conflict of laws. Assuming that the doctrine announced in the *Klaxon* case is applicable here, where jurisdiction did not depend upon the accident of diversity of citizenship, the court below in fact applied the choice of law rule of the forum state. In such circumstances, the failure of the court below specifically to refer in its opinion to the Missouri rule of conflict of laws was at most a harmless error, and constitutes no ground for granting a writ of certiorari.

2. Petitioner insists that, under the law of Missouri, the courts of that state can take no judicial notice of the law of a foreign state, unless it be specifically alleged and proved. From this it argues (Pet. 15–20) that a federal court must apply the same rule of evidence as does the forum, and that the courts below were not entitled to take judicial notice of the Illinois statutes and decisions. A conflict with *Waggaman* v. *General Finance Co.*, 116 F. (2d) 254, 257 (C. C. A. 3) is asserted.

The decision in the *Waggaman* case, whatever its correctness,[1] does not conflict with the decision be-

[1] The rule of the *Waggaman* case may be questioned, in the light of the well settled principle that the lower federal

low. There the jurisdiction of the court depended upon diversity of citizenship, and, as the Third Circuit noted (p. 257), the policy of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 might be thought to reach to the point that the suitors in the federal courts are to be placed under the same procedural burdens as those in the state courts. Since respondent is federally incorporated, however, the federal courts cannot take jurisdiction because of diversity of citizenship. *Bankers Trust Co.* v. *Texas & Pac. Ry.,* 241 U. S. 295, 309–310. The jurisdiction of the federal court in this case arose, instead, from the statute of Congress authorizing respondent to sue and be sued in state and federal courts. Section 12B (j), *infra;* see also *Pacific Railroad Removal Cases,* 115 U. S. 1; Act of February 13, 1925, sec. 12, 43 Stat. 936, 941 (28 U. S. C. sec. 42); *Federal Bank* v. *Mitchell,* 277 U. S. 213. There is nothing in the specific statutory source of jurisdiction, or in the jurisdiction based upon the federal incorporation and ownership of respondent, which suggests that the rule of the *Erie R. Co.* v.

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courts take judicial notice of the laws of all of the states. *Hanley* v. *Donoghue,* 116 U. S. 1, 6; *Mills* v. *Green,* 159 U. S. 651, 657. This Court has repeatedly announced that the purpose of the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, was to obtain equality of results in cases depending upon the accident of diversity of citizenship. Clearly, a procedural rule such as the necessity of alleging and proving foreign law does not come within the evils which that decision undertook to correct.

Tompkins is applicable,[2] and *Deitrick* v. *Greaney*, 309 U. S. 190, suggests an opposite conclusion in the field of federal banking. We respectfully submit, therefore, that the decision of the court below was correct, and that its opinion did not conflict with that of the Circuit Court of Appeals for the Third Circuit in the *Waggaman* case.

3. We see no merit to petitioner's contention that the application of Illinois law, preventing an accommodation maker of a note from pleading lack of consideration even after maturity, is opposed to the public policy of Missouri. The general public policy of Missouri, as expressed by its rule of conflict of laws, is that the rights and obligations of parties to a negotiable instrument are governed by the law of the place where the note is made payable and where it is delivered. *Johnson* v. *Gawtry*, 83 Mo. 339. Petitioner advances no reason and points

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[2] The rule announced in *Erie R. Co.* v. *Tompkins*, *supra*, is probably not applicable in a suit to which the United States is a party. *Board of Commissioners of Jackson County* v. *United States*, 308 U. S. 343, 350, 352; *Royal Indemnity Co.* v. *United States*, No. 817, decided May 26, 1941. Nor does the reasoning which led to the rule adopted in that case suggest that it should apply to corporate agencies or instrumentalities of the United States. The respondent is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. More than 50 per cent of its stock is held directly by the Treasury of the United States. 12 U. S. C. 264 (d). The remaining stock is held by the Federal Reserve banks but does not vote and carries no dividends and is beneficially owned by the United States. 12 U. S. C. 290.

to no Missouri case which indicates that the Missouri courts would find the Illinois rule as to matured accommodation notes so distasteful as to fall before the force of local public policy. Accordingly, the failure of the court below affirmatively to find that the Illinois law which it applied was not repugnant to the law of the forum state is not erroneous.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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AUGUST 1941.

APPENDIX

Section 12B of the Federal Reserve Act, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162, 168, 172 (12 U. S. C. 264 (a), (j)) provides in part as follows:

> (a) There is hereby created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation"), whose duty it shall be to purchase, hold, and liquidate, as hereinafter provided, the assets of national banks which have been closed by action of the Comptroller of the Currency, or by vote of their directors, and the assets of State member banks which have been closed by action of the appropriate State authorities, or by vote of their directors; and to insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this section.
>
> * * * * * *
>
> (j) Upon the date of enactment of the Banking Act of 1933, the Corporation shall become a body corporate and as such shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession until dissolved by an Act of Congress.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal.
>
> Fifth. To appoint by its board of directors such officers and employees as are not otherwise provided for in this section, to de-

fine their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe by its board of directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted.

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FEDERAL DEPOSIT INSURANCE CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	7
Argument	15
Introductory	15
I. The court below was correct in applying the law of Illinois, assuming that such law did not need to be pleaded or proved	17
II. The court below properly took judicial notice of the law of Illinois without plea or proof notwithstanding the Missouri rule that judicial notice may be taken of the laws of sister states only if pleaded	22
A. The federal courts have heretofore taken judicial notice of the laws of the several states. As a general rule the state courts of Missouri, however, may notice the laws of a sister state only if pleaded	23
B. The doctrine of *Erie R. Co.* v. *Tompkins* did not preclude the courts below from taking judicial notice of the Illinois law in accordance with traditional federal practice	27
1. The Missouri statute abrogated the common law requirement that the laws of sister states must be proved by the introduction of evidence and left only the pleading requirement, which is inapplicable in the federal courts	29
2. Even if the abrogation of the Missouri common law rule of proof is conditioned upon the pleading of sister state law, the *Tompkins* doctrine did not preclude the federal courts from taking judicial notice of the Illinois law	34
III. Petitioner is estopped to deny liability on the note	45
1. Petitioner is estopped under federal statutory law	48
2. Petitioner is estopped also under Illinois law which the courts of Missouri would be bound to apply	54

435396—42——1

Page

Conclusion 57
Appendix 59

CITATIONS

Cases:

Adam v. *Saenger*, 303 U. S. 59 24
Adamson v. *Fogelstrom*, 221 Mo. App. 1243 25
Alaska Packers Association v. *Commission*, 294 U. S. 532 56
Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209 51
Banchor v. *Gregory*, 9 Mo. App. 102 ..... 25, 31
Bank v. *Schmidt*, 168 Mo. App. 153 16
Bank of Slater v. *Union Station Bank*, 283 Mo. 308 48
Banks v. *Burnam*, 61 Mo. 76 40
Bauserman v. *Blunt*, 147 U. S. 647 33
Board of County Commissioners of County of Jackson v. *United States*, 308 U. S. 343 ..... 18, 51
Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274 ..... 46, 55
Bowen v. *Johnston*, 306 U. S. 19 ..... 23, 24, 37
Bradford Electric Co. v. *Clapper*, 286 U. S. 145 56
Brady v. *Daly*, 175 U. S. 148 ..... 33, 43
Brown v. *Piper*, 91 U. S. 37 ..... 23, 37
Campbell v. *Haverhill*, 155 U. S. 610 ..... 33, 43
Cantley v. *Plattner*, 228 Mo. App. 411 21
Carson National Bank v. *American National Bank*, 225 Mo. App. 948 19
Case v. *Kelly*, 133 U. S. 21 38
Central Republic Trust Co. v. *Evans*, 307 Ill. App. 605 ..... 14, 55
Charlotte v. *Choteau*, 25 Mo. 465 25
Charlotte v. *Choteau*, 33 Mo. 194 ..... 25, 26, 40
Chastleton Corp. v. *Sinclair*, 264 U. S. 543 ..... 37, 39
Chattanooga Foundry v. *Atlanta*, 203 U. S. 390 43
Cheever v. *Wilson*, 9 Wall. 108 23
Chicago Title & Trust Co. v. *Brady*, 165 Mo. 197 ..... 48, 57
Cobb v. *The Griffith & Adams Co.*, 87 Mo. 90 25
Coca-Cola Bottling Co. v. *Munn*, 99 F. (2d) 190 29
Coleman v. *Lucksinger*, 224 Mo. 1 25
Course v. *Stead*, 4 Dall. 22 23
Covington Drawbridge Co. v. *Shepherd*, 20 How. 227 38
Cray, McFaun & Co. v. *Hegarty & Co.*, 27 F. Supp. 93 23
Crohn v. *U. C. T.*, 170 Mo. App. 273 20
Curtis v. *Martin*, 2 N. J. L. 377 56
Davis v. *McColl*, 179 Mo. App. 198 19
Deitrick v. *Greaney*, 309 U. S. 190 ..... 13, 18, 45, 47, 50, 52, 53, 55
Dimmick v. *Tompkins*, 194 U. S. 540 40
Elgin National Bank v. *Goecke*, 213 Ill. App. 559 16
Elwood v. *Flannagan*, 104 U. S. 562 23
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 9, 17, 22, 24, 27, 28, 31, 33, 39
Farmers Bank v. *Harris* (Mo. App.), 250 S. W. 946 ..... 16, 21, 57
Fidelity Trust Co. v. *Field*, 311 U. S. 169 28

Cases—Continued. Page

Flato v. *Mulhall*, 72 Mo. 522 25
Ford v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538 ..... 16, 21
Foreman Trust & Savings Bank v. *Cohn*, 342 Ill. 280 16
Fourth National Bank v. *Francklyn*, 120 U. S. 747 23
Franklin Bank v. *St. Louis Car Co.*, 321 Mo. 199 16
Freshman v. *Atkins*, 269 U. S. 121 40
Gallup v. *Caldwell*, 120 F. (2d) 90 23
Gardner v. *The Collector*, 6 Wall. 499 37
Golden v. *Cervenka*, 278 Ill. 469 ..... 14, 52, 54
Gorman v. *Terminal Ry. Co.*, 325 Mo. 326 27
Gormley v. *Bunyan*, 138 U. S. 623 23
Gasquet v. *Lapeyre*, 242 U. S. 367 45
Griffin v. *McCoach*, 313 U. S. 498 ..... 17, 18
Hanley v. *Donoghue*, 116 U. S. 1 ..... 23, 24
Hansen v. *Duvall*, 333 Mo. 59 21
Hauck Clothing Co. v. *Sharpe*, 83 Mo. App. 385 19
Hawkins v. *Barney's Lessee*, 5 Pet. 457 33
Herron v. *Southern Pacific Co.*, 283 U. S. 91 36
Iglehart v. *Todd*, 203 Ind. 427 53
Illinois Fuel Co. v. *M. & O. R. R. Co.*, 319 Mo. 899, certiorari denied, 278 U. S. 640 20
John Hancock Ins. Co. v. *Yates*, 299 U. S. 178 56
Johnston v. *Gautry*, 83 Mo. 339, affirming 11 Mo. App. 322 ..... 19, 20
Jones v. *United States*, 137 U. S. 202 39
Karr v. *Jackson*, 28 Mo. 316 56
Klaxon Co. v. *Stentor Co.*, 313 U. S. 487 ..... 7, 17, 18, 28, 33, 42, 56
Knass v. *Madison & Kedzie Bank*, 354 Ill. 554 55
Lamar v. *Micou*, 114 U. S. 218 ..... 23, 37
Leland v. *Wilkinson*, 6 Pet. 317 38
Lewis v. *McMahon & Co.*, 307 Mo. 552 48
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 24
Long v. *Long*, 141 Mo. 352 19
Loranger v. *Nadeau*, 215 Cal. 362 30
Lowry v. *Fire Ins. Co.*, 219 Mo. 121 ..... 25, 26, 31
Machine Co. v. *Tomlin*, 174 Mo. App. 512 19
Massa v. *Huehneroff* (Mo. App.), 59 S. W. (2d) 723 ..... 16, 21
Mason v. *United States*, 260 U. S. 545 33
McClaine v. *Rankin*, 197 U. S. 154 43
McDonald v. *Life Ass'n*, 154 Mo. 618 ..... 25, 31
McElmoyle v. *Cohen*, 13 Pet. 312 33
McNiel v. *Holbrook*, 12 Pet. 84 ..... 32, 38, 44
Meyer v. *McCabe*, 73 Mo. 236 25
Miller v. *Larned*, 103 Ill. 562 16
Mills v. *Green*, 159 U. S. 651 23
Menard v. *Goltra*, 328 Mo. 368 ..... 27, 28
Modern Woodmen of America v. *Mixer*, 267 U. S. 544 56
Motor Co. v. *Warren*, 113 Kansas 44 41

Cases—Continued. Page

National Fire Ins. Co. v. *Thompson*, 281 U. S. 331 40
Neef v. *Potter*, 226 Ill. 628 16
Neff v. *Sovereign Camp W. O. W.*, 48 S. W. (2d) 564 ..... 27, 30
Niblack v. *Farley*, 286 Ill. 536 ..... 14, 55
Norman v. *Insurance Co.*, 237 Mo. 576 25
Ohio v. *Hinchman*, 27 Pa. 479 56
O'Sullivan v. *Felix*, 233 U. S. 318 43
Owings v. *Hull*, 9 Pet. 607 ..... 23, 38
Pacific Ins. Co. v. *Commission*, 306 U. S. 493 56
Patton v. *United States*, 281 U. S. 276 37
Pennington v. *Gibson*, 16 How. 64 ..... 23, 41
Phoenix Mutual Life Ins. Co. v. *Simons*, 52 Mo. App. 357 19
Pink v. *A. A. A. Highway Express, Inc.*, No. 48, this Term, decided December 8, 1941 56
Railroad Co. v. *Bank of Ashland*, 12 Wall. 226 38
Ramey v. *Mo. Pac. R. R. Co.*, 323 Mo. 662 ..... 26, 27, 31
Rashall v. *Railroad*, 249 Mo. 509 ..... 25, 31
Renaud v. *Abbott*, 116 U. S. 277 55
Richards v. *Richards*, 270 Mass. 113 30
Roberts v. *Reilly*, 116 U. S. 80 23
Royal Indemnity Co. v. *United States*, 313 U. S. 289 18
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202 28
St. Joseph Water Co., State ex rel. v. *Eastin*, 270 Mo. 193 40
Sampson v. *Channell*, 110 F. (2d) 754 29
Savannah Ry. v. *Evans*, 121 Ga. 391 30
School of Osteopathy v. *Turner*, 143 Mo. App. 416 ..... 19, 20
Sibbach v. *Wilson & Co.*, 312 U. S. 1 ..... 28, 32, 33
Siemans & Halski Electric Co. v. *Ten Brock*, 97 Mo. App. 173 21
Sims v. *Hundley*, 6 How. 1 32
Slaughter v. *Railroad*, 116 Mo. 269 25
Sloan v. *Terry*, 78 Mo. 623 25
South Missouri Land Co. v. *Rhodes*, 54 Mo. App. 129 19
State Bank v. *Forsyth*, 41 Mont. 249 53
Swift v. *Tyson*, 16 Pet. 1 24
Tennant v. *Insurance Co.*, 133 Mo. App. 345 19
Tilden v. *Blair*, 21 Wall. 241 20
Town of South Ottawa v. *Perkins*, 94 U. S. 260 ..... 24, 37, 38
Union Pacific Railway v. *Wyler*, 158 U. S. 285 ..... 23, 31
United States v. *Eckford*, 6 Wall. 484 ..... 32, 33
United States v. *Turner*, 11 How. 662 24
Vance v. *Campbell*, 1 Black 427 43
Waggaman v. *General Finance Co.*, 116 F. (2d) 254 22
Walker v. *Dunham*, 135 Mo. App. 396 21
Wayman v. *Southard*, 10 Wheat. 1 ..... 32, 33
Wright v. *Bales*, 2 Black 535 43

Statutes:	Page
Act of June 19, 1934 (48 Stat. 1064, 28 U. S. C. 723)	32
Banking Act of 1935 (49 Stat. 713, 12 U. S. C. 264)	49
Conformity Act (R. S. sec. 914, 28 U. S. C. sec. 724)	31
Federal Reserve Act, Sec. 12B, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162	59
Laws (Missouri) 1927, p. 156; R. S. 1929, sec. 806	26
Mo. Rev. Stat. 1929, secs. 1649, 5388	40
Mo. Rev. Stat. 1929, sec. 806	62
Process Acts of 1789 and 1792 (1 Stat. 93, 275–276)	32, 42
Revised Statutes secs. 905–906, 28 U. S. C. 687–688	55
12 U. S. C. 264 (d)	19
12 U. S. C. 290	19
Miscellaneous:	
Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L. J. 62	33, 41
Cook, *"Substances" and "Procedure" in the Conflict of Laws*, 42 Yale L. J. 333	29
Federal Deposit Insurance Corporation Annual Report, 1934	52, 53
Federal Rules of Civil Procedure	10, 32, 33, 35
46 Harv. L. Rev. 1019 (note)	41
Moore, *Federal Practice* (1938), p. 36, 41–42	32
Restatement of Conflict of Laws:	
Sec. 320	20
Restatement of the Law of Torts, § 321	54
Simkins, *Federal Practice*, pp. 9–10	33
Thayer, *Law and Fact in Jury Trials*, 4 Harv. L. Rev. 147	44
Tunks, *Categorization and Federalism*, 34 Ill. L. Rev. 271, 278i, 282, 301	29
Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49	43
Wigmore, *Evidence* (3d Ed.), sec. 5, sec. 1684	33, 40

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, A
CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The judgment of the District Court of the United States for the Eastern District of Missouri (R. 72) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 87–94) is reported in 117 F. (2d) 491.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was

entered on February 11, 1941 (R. 94). A petition for rehearing was denied on March 27, 1941 (R. 99). The petition for a writ of certiorari was filed June 25, 1941, and was granted October 13, 1941. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent brought suit in the federal court in Missouri on an accommodation note dated and made payable in Illinois. The note was given by petitioner for the purpose of having it appear as a live asset of the payee, an Illinois bank which subsequently was insured by respondent. The bank assigned the note to respondent as collateral for a loan. Applying Illinois law without plea or proof thereof, the court below held for respondent. The questions are:

1. Whether the failure of the court below expressly to find the Missouri rule as to choice of law is error requiring a remand when the rule applied is the same as that of the Missouri courts.

2. Whether the court below was precluded from taking judicial notice of the Illinois law by reason of the Missouri rule that judicial notice may be taken of the laws of sister states only when pleaded.

3. Whether petitioner is estopped to deny liability on the note.

STATUTE INVOLVED

The pertinent portions of Section 12B of the Federal Reserve Act are set forth in the Appendix, *infra*, pp. 59–61.

STATEMENT

The respondent, Federal Deposit Insurance Corporation, brought suit in the United States District Court for the Eastern District of Missouri upon a promissory note for $5,000 executed by the petitioner (R. 3–4). The note had been assigned to the respondent by the payee, Belleville Bank & Trust Company, hereinafter called the bank (R. 13). The petitioner answered, alleging that the note was accommodation paper given to the bank without consideration, that the respondent had acquired title to the note after maturity, and that it was not a holder in due course (R. 6–9). By leave of court respondent replied, denying the alleged lack of consideration and asserting that petitioner was estopped to raise the defense because the note was furnished for the purpose of deceiving the creditors of the bank, state banking authorities, and respondent, as to the true condition of the bank (R. 10). The District Court rendered judgment for the respondent and the court below affirmed (R. 94).

The facts as found by the District Court may be stated as follows:

Petitioner is a Missouri corporation engaged in the investment security business with principal

office and place of business in St. Louis (R. 66, 68). In 1918 and 1920 petitioner sold to the bank drainage district bonds in the amount of $5,000, which matured August 1, 1926. Upon maturity the bank forwarded the bonds to petitioner to be presented for payment, and the bonds were dishonored by reason of no funds. The cashier of the bank, which was a steady customer of petitioner and continued to be such (R. 42, 52, 68), then requested petitioner to execute two notes payable to the bank in the respective amounts of $2,000 and $3,000, which would enable the bank to carry the notes and not show any past due bonds in the bank. Petitioner, by Herman Duhme, who was then petitioner's vice-president and who was its president at the time of the trial, executed two collateral demand notes, each dated August 1, 1926, and payable to the bank. Duhme knew that the notes were executed for the reason that the bank did not want its assets to show any past due bonds (R. 71). The notes were signed at petitioner's office in St. Louis, Missouri, were by their terms made payable at petitioner's office there, and were delivered to the payee at Belleville, Illinois (R. 75). One of the notes was for $2,000, bearing 6 percent interest; the other note was for $3,000, bearing interest at 5½ percent. The collateral agreement of each note recited that a corresponding amount of the defaulted drainage district bonds was pledged as security (R. 68). Under date of August 4, 1926, the bank, by its assistant cashier, acknowledged in writ-

ing receipt of the two demand notes. There was appended to each of the receipts the following statement: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." These receipts were not attached to the notes, but were delivered to petitioner and retained in its possession (R. 69). A search of the records of the bank in August 1938 failed to disclose any copies of the receipts (R. 69).

From August 1926 until March 1932, petitioner paid the bank interest amounting to $1,601.56. The interest payments were made by petitioner's officers so as to keep the two notes as live paper (R. 69–70, 71). One or more renewal notes were given prior to the execution of the note upon which the instant suit was brought (R. 70). This note (R. 13), dated Belleville, Illinois, January 1, 1933, was in the principal sum of $5,000, bearing interest at the rate of 6 percent, and was payable on demand at the office of the bank at Belleville, protest, presentment, and notice being waived (R. 66–67). The evidence did not disclose where the note was signed (R. 75), but it was signed in compliance with a request made to petitioner by a representative of the bank that inasmuch as the existing note or notes had become too old a new note should be executed (R. 70). On July 29, 1935, the bank charged the note off as an asset (R. 70). Thereafter on July 30, 1937, the bank sold the defaulted bonds for $100, and that amount later was credited by respondent to interest due on the note (R. 70).

On or about April 2, 1938, the bank borrowed from respondent the sum of $1,349,558.07, giving a demand note and pledging certain collateral as security therefor, including the note here involved, which the bank indorsed without recourse to the order of the respondent (R. 67). The uncontradicted evidence shows that the loan was made as a means of satisfying the respondent's liability to depositors of the bank under the insurance granted by it in 1934 (R. 62–64). The entire proceeds of the loan were, according to the agreement, turned over to the First National Bank of Belleville which assumed the liabilities of the bank (R. 67). The bank failed to pay its loan to the respondent on demand, and, under the terms of the loan, respondent was empowered to collect in its own name all collateral securing the debt (R. 67). In August 1938, the respondent made demand upon petitioner for payment of the note in suit (R. 67). Payment was refused and respondent for the first time was advised that the note had been given without consideration and with the understanding that it would not be called for payment and that all interest payments would be restored (R. 67, 69, 71).

The District Court, after finding the foregoing facts, concluded that the respondent was an innocent holder in good faith and for value, that the defense of lack of consideration was not proved to the satisfaction of the court, and that under the facts of the case the petitioner was estopped to

assert lack of consideration (R. 71). Thereafter, the court entered additional conclusions of law holding that the note sued on constituted a new contract between the parties, and that the rights of the parties on the notes were governed by the law of Illinois (R. 75). It thereupon entered judgment for the respondent in the sum of $5,000, with interest thereon from May 1, 1933, and 10 percent of the principal and interest as attorney fees, pursuant to a provision in the note (R. 13), making the total judgment $7,376.41 (R. 71–72). On appeal the Circuit Court of Appeals for the Eighth Circuit affirmed, holding that the note was governed by the law of Illinois, and that under such law respondent was a holder in due course (R. 87–94).

SUMMARY OF ARGUMENT

The questions involved in this case arise from petitioner's contention that the note sued upon was an accommodation note and that the defense of lack of consideration is good as against respondent. If Missouri law is applicable, respondent is not a holder in due course, the note having been negotiated too late, and the alleged defense is valid assuming that petitioner is not estopped to assert it. However, if the law of Illinois is applicable, as was held by the court below, a contrary result must be reached.

I

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, decided subsequent to the decision of the court below,

this Court held that the federal courts must apply the conflicts of law rule of the state of the forum. The court below did not find the choice of law rule of Missouri, but it in fact applied it in holding that the law of Illinois was controlling. Hence its error in not specifically finding the Missouri rule was harmless. The local decisions showing that the law of Illinois would be applied in the Missouri courts avoid any occasion for this Court to remand the case for the Missouri conflicts rule to be considered in the first instance by the court below.

The note in suit was dated, made payable, and presumably delivered in Illinois. The Missouri decisions permit of no doubt that such a note is controlled by Illinois law. Although the original notes executed in 1926 were signed and made payable in Missouri, such fact is immaterial. Since they were found to have been delivered in Illinois, it is probable that they were governed by the law of that state; and if they were governed by Missouri law, it would not follow that the note in suit, as a renewal note, also would be. The original notes never were negotiated and the note in suit, which was negotiated, contained different provisions.

II

In this case the law of Illinois was neither pleaded nor proved by formal evidence. The petitioner contends that since the state courts of Missouri will not notice the laws of a sister state

unless they are pleaded, the federal courts may not do so because of the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. The contention is without substance. The principle of uniformity of decision in coordinate federal and state courts, which underlies the *Tompkins* doctrine, does not require that the federal courts be denied power to take judicial notice of a state law which would not be noticed in the state courts of the forum and the Missouri rule and the grounds on which it proceeds have no application in the federal courts.

In the federal courts both the "existence" and the interpretation of state law are for the determination of the court. And since a law of any state is regarded as a "domestic" law, its "existence" may be judicially noticed without plea or proof. Announced by this Court more than a century ago, the rule has been consistently enforced both before and since the decision in the *Tompkins* case.

Under the Missouri common law rule, the law of a sister state, like that of a foreign country, is a "fact," and save as otherwise provided by statute, must be proved, apparently to the jury. Because it is a fact which may not be noticed, it must also be pleaded to the extent required by local practice with respect to fact pleading generally. Undoubtedly, the origin of the rule is to be found in the fact that copies of the relevant statutes and decisions were at one time not readily accessible to the local courts. In recognition of

present-day conditions, Missouri in 1927 enacted a statute permitting judicial notice to be taken of sister state law. The statute, however, retains the "archaic" pleading requirement and where this requirement has not been waived, the state courts reluctantly do not notice the laws of other states.

1. Under the Missouri statute, as construed by the local courts, the pleading requirement and the provision for judicial notice of sister state laws without formal proof are separable. In this view, the question whether a local rule as to judicial notice of a sister state law is binding in the federal courts is not critical, since the state rule is the same as that which the federal courts have always applied. And the local rule that a law of a sister state must be pleaded, like other local rules of pleading, is not controlling in the federal courts.

The Conformity Act has never been construed to require that the federal courts follow local practice on the pleading of the law of a sister state and there is no occasion now to give the Act such a construction. And the Rules of Decision Act has no application to matters of pleading. Moreover, the Federal Rules of Civil Procedure establish the exclusive rule in matters of pleading in the federal courts and any inconsistent statute making state law applicable is to this extent repealed.

2. Even if it be assumed that pleading a sister state law is a necessary condition of judicial notice of such law in Missouri state courts, the *Tompkins* rule does not preclude the federal courts in Missouri from noticing the laws of Illinois.

(a) Questions in the federal courts as to the existence and construction of any state law are matters for the judge rather than jury. Neither the Conformity Act nor the Rules of Decision Act requires the application of a contrary state law regulating the relative functions of the court and jury in the federal courts. On like principle, the federal courts may consult the usual sources even though the state courts would not trouble to do so without formal proof. Particularly is this so since the question whether judicial notice shall be taken ultimately depends on whether the reports and books usually resorted to in ascertaining the law involved are readily accessible to the particular court charged with the duty of making the inquiry. The application of the local rule would result in manifest absurdities, since it could not be justified on any principle not equally applicable to the proof of federal laws or of the "facts" of the law on which the decision of federal questions may depend.

(b) If any state law is to be applied, it should be the law of the state whose substantive law is involved, here Illinois. The Rules of Decision Act declares that state laws shall be deemed rules of

decision only "in cases where they apply" and, unlike statutes directing that state practice and procedure be followed, does not expressly direct the application of the law of the forum. In a diversity case involving a conflict of two valid state laws the purpose of the Constitution to provide equality of justice to non-citizens, and not inequality to citizens normally requires that a federal court administer the law of the state in which it sits. But decisions of this Court illustrate that these considerations of policy are not of universal application. Certainly if the rule of any state has practical relevance to judicial notice in the federal courts, it is the rule of the state whose substantive law is involved.

(c) The result should be the same even if the Rules of Decision Act requires the choice of the *lex fori* wherever state law is applicable. If the Act does require such choice, the local law permitting judicial notice of "domestic" laws might nevertheless be applied in the view that every state law is a "domestic" law in the federal courts. Each state, although sovereign and independent of each other, is a component part of the Union and each bears the same legal relationship to the Federal Government. The federal courts in Missouri may therefore be presumed to know the law of every state and, with proper assistance in refreshing their judicial recollection, may ascertain the law of Illinois as readily as that of Missouri.

III

As was held by the district court, petitioner is estopped to deny liability on the note in controversy.

1. The Federal Deposit Insurance Corporation was established under Section 12B of the Federal Reserve Act, enacted as part of the Banking Act of 1933. The original subdivision (y) thereof provided that prior to the granting of insurance to a state bank not a member of the Federal Reserve System, the respondent should make an examination of the financial affairs of the bank to ascertain its solvency and should obtain a certificate of solvency from the local state banking authorities. It also authorized the respondent to make examinations subsequent to the issuance of insurance. The policy of Section 12B condemns the transaction here involved and requires that petitioner be estopped to assert that the note was given without consideration or with the understanding that it would not be collected.

This would be plainly so if the note had been executed after the passage of Section 12B. *Deitrick* v. *Greaney*, 309 U. S. 190. Petitioner's agent and vice president understood that the bank desired the note in order to have it instead of the dishonored bonds showing on its books. The purpose of the provisions for examinations by respondent and the furnishing of certificates of solvency by the state authorities would be defeated

if the true financial status of the bank could thus be concealed. By necessary implication, therefore, the statute would have condemned petitioner's and the bank's action and precluded resort to the defense of lack of consideration as against respondent.

In the circumstances it is immaterial that the note in suit was executed shortly before the passage of Section 12B. Under familiar legal principle, which may be invoked in construing the reach of the federal statute, petitioner was under a duty to warn respondent or otherwise assure that it would not be deceived. Yet petitioner did not do so. Moreover, the provision requiring respondent to obtain state certificates of solvency before insuring banks manifests the Congressional purpose to extend the reach of the implied condemnation to prior acts having an "evil tendency" to deceive the state authorities.

2. Petitioner is also estopped to deny liability under Illinois law and the courts of Missouri are required to enforce the Illinois law. The Illinois rule is the same as we urge the federal rule to be and is implied from the purpose and policy of the state banking statutes. *Golden* v. *Cervenka*, 278 Ill. 409 (1917); *Niblack* v. *Farley*, 286 Ill. 536, 540 (1919); *Central Republic Trust Co.* v. *Evans*, 307 Ill. App. 605, 641–643 (1940). State statutes are "public acts" within the purview of the Full Faith and Credit Clause, and, as construed by the local

courts, must be given effect in other states having no conflicting policy of their own. Missouri has no interest in protecting its residents participating in the deception of those dealing with Illinois banks sufficient to permit the Missouri courts to hold that petitioner is not estopped.

ARGUMENT

INTRODUCTORY

The conflicts of law and other questions involved in this case arise from petitioner's alleged defense that the note sued upon was given by it without consideration. Such defense, it is said, is good as against respondent for the reason that, under the law of Missouri, respondent is not a holder in due course, the note, a demand note, having been negotiated more than five years after issuance. Although the district court was not satisfied that petitioner had sustained its burden of proving lack of consideration (R. 71), the court below treated the note as one for the bank's accommodation (R. 88–94). For present purposes we assume that the court below was correct in so doing.[1]

In addition, we concede that under the law of Missouri the defense of absence of consideration

[1] The principal evidence introduced by petitioner to show absence of consideration, aside from the testimony of its own witnesses, was the agreement by the assistant cashier of the bank not to call for payment and to repay interest (R. 68–69).

is good except as against a holder in due course,[2] and that a holder of a demand note negotiated as long as five years after issuance is not a holder in due course.[3] Thus, if the Missouri law were applicable, respondent would not be entitled to collect on the note, assuming contrary to our final contention (*infra*, pp. 44–57), petitioner is not estopped to raise its defense.

On the other hand, if the law of Illinois is controlling, as was held by the courts below, the defense of lack of consideration would not be available. For in Illinois the transferee for value of accommodation paper takes it discharged of any defense of lack of consideration which the maker might have had as against the party accommodated, whether or not it was negotiated after maturity and whether or not the transferee had notice of the absence of consideration.[4] Neither in the court below nor in its petition for certiorari did petitioner contend that the law of Illinois is not as stated.

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[2] *Farmers Bank* v. *Harris* (Mo. App.), 250 S. W., 946 (1923); *Ford* v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538 (1926); *Massa* v. *Huchneroff* (Mo. App.), 59 S. W. (2d) 723 (1933).

[3] *Franklin Bank* v. *St. Louis Car Co.*, 321 Mo. 199 (1928); *Bank* v. *Schmidt*, 168 Mo. App. 153 (1912).

[4] *Miller* v. *Larned*, 103 Ill. 562 (1882); *Neef* v. *Potter*, 226 Ill. 628 (1907); *Elgin National Bank* v. *Goecke*, 213 Ill. App. 559 (1919); *Foreman Trust & Savings Bank* v. *Cohn*, 342 Ill. 280 (1930).

It is evident, therefore, that apart from the question of estoppel, the outcome of this case is dependent upon the issue with respect to choice of law. We show under Point I that the court below was correct in applying Illinois law. Under Point II we show that this is true notwithstanding that Illinois law was not pleaded as would have been required if the action had been brought in a Missouri state, instead of federal, court.

I

THE COURT BELOW WAS CORRECT IN APPLYING THE LAW OF ILLINOIS, ASSUMING THAT SUCH LAW DID NOT NEED TO BE PLEADED OR PROVED

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, this Court held that the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, required that in diversity of citizenship cases, at least, the federal courts must apply the conflicts of law rule of the forum. The court below decided the instant case prior to that holding, and in its opinion it did not consider the Missouri rule as to the choice of law governing petitioner's obligation. We submit, however, that such failure was harmless error at most, and that it does not require that the case be remanded. Cf. *Griffin* v. *McCoach*, 313 U. S. 498, 503–504. This is so even assuming that the *Klaxon* decision is applicable in suits such as the instant where the federal jurisdiction is

based upon an act of Congress (Federal Reserve Act, Sec. 12B (j), Appendix, *infra*, pp. 58–59), rather than upon diversity of citizenship, and where the suit is brought by a corporate agency or instrumentality of the United States.[8]

That the error, if any, was harmless appears from the fact that the Missouri choice of law rule, if it had been found and followed, would have led to the same result as was reached by the court below, namely, the application of Illinois law and consequent recovery by respondent. The pertinent decisions of the Missouri courts seem sufficiently clear on the point not to call for exercise of this Court's discretion to remand the case for them to be considered in the first instance by the court below pursuant to the course followed in the *Klaxon* and *Griffin* cases.

Thus in Missouri, as generally elsewhere, in the absence of evidence that the parties intended otherwise, the law of the place of contracting determines the obligation of a promisor.[9] Under the Missouri

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[8] There is nothing in the Federal Reserve Act or Banking Act of 1933 which suggests that the *Tompkins* doctrine is applicable herein, and *Deitrick* v. *Greaney*, 309 U. S. 190, suggests that it may be inapplicable generally in the field of federal banking. It may also be inapplicable in suits in which the United States is a party. *Board of County Commissioners of County of Jackson* v. *United States*, 308 U. S. 343, 350, 352; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. But see *infra*, p. 43. If so,

decisions the place of contracting in the instant case was Illinois, since the note sued upon was dated at Belleville, Illinois, was payable at the bank there, and presumably was delivered at the same place (R. 13, 19–20). Whether any one or two of these circumstances would alone be determinative and, if so, which, need not be specified, for it is clear that in combination they more than suffice. *South Missouri Land Co.* v. *Rhodes*, 54 Mo. App. 129, 133 (1893); *Hauck Clothing Co.* v. *Sharpe*, 83 Mo. App. 385 (1900); *Machine Co.* v. *Tomlin*, 174 Mo. App. 512, 520 (1913); *Carson National Bank* v. *American National Bank*, 225 Mo. App. 948 (1930); *Johnston* v. *Gawtry*, 83 Mo. 339 (1884); *Phoenix Mutual Life Ins. Co.* v. *Simons*, 52 Mo. App. 357 (1893); *Tennant* v. *Insurance Co.*, 133 Mo. App. 345, 352 (1908); *School of Osteopathy* v. *Turner*,

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the same may be true of suits in which the respondent is a party. The respondent is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. More than 50 per cent of its stock is held directly by the Treasury of the United States. 12 U. S. C. 264 (d). The remaining stock is held by the Federal Reserve banks but does not vote and carries no dividends and is beneficially owned by the United States. 12 U. S. C. 290.

[6] *Johnston* v. *Gawtry*, 83 Mo. 339, 343 (1884), affirming 11 Mo. App. 322, 330 (1882); *Long* v. *Long*, 141 Mo. 352, 372–373 (1897); *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899, 923 (1928), certiorari denied, 278 U. S. 640; *Davis* v. *McColl*, 179 Mo. App. 198, 202, 207 (1914).

143 Mo. App. 416, 417 (1910); *Crohn* v. *U. C. T.*, 170 Mo. App. 273, 279 (1913).[7]

In the court below and in its reply to the respondent's brief in opposition to the petition for certiorari, petitioner's sole answer to the foregoing was that the note in suit was a renewal note and that therefore it was controlled by the same law as was applicable to the original notes of August 1, 1926. There are two answers to this contention. First, it is probable that under the choice of law rule of Missouri, petitioner's obligation on the original notes, as well as on the note in suit, was governed by Illinois law since, although signed and made payable in Missouri, they were found to have been delivered in Illinois (R. 75). See *Johnston* v. *Gawtry*, 83 Mo. 339 (1884); *School of Osteopathy* v. *Turner*, 143 Mo. App. 416, 417 (1910), and other cases cited, *supra*, p. 19. That Illinois law would be applied to the original notes is further indicated by the fact that the bank's contemporaneous agree-

[7] As regards accommodation paper, the rule of the Restatement of Conflict of Laws, Sec. 320, is that the place of contracting is the place of first delivery for value to a third person. Compare Secs. 312, 313. See *Tilden* v. *Blair*, 21 Wall. 241. This comports with the Missouri view that the place of contracting is the place where the last act necessary to give rise to a contract is performed. *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899, 923 (1928). The concurring opinion in *Hauck Clothing Co.* v. *Sharpe*, *supra*, 394, treats the place of first negotiation for value as decisive in the case of accommodation paper. We have found no Missouri decision either squarely supporting or conflicting with that view.

ment with petitioner not to demand payment of the notes and to return interest payments was both executed and delivered in Illinois (R. 36–37, 46–47).

Secondly, even if it were assumed that petitioner's liability on the original notes was controlled by Missouri law, it would not follow that the same law would be applicable with respect to the note in suit. According to Missouri law the renewal of a contract ordinarily is governed by the same law as controlled the original, though executed in a different state. See *Hansen* v. *Duvall*, 335 Mo. 59, 74 (1933).[8] The original notes herein, however, never became contracts, since they were not negotiated. Moreover, under Missouri law a renewal note may stand as a new contract and be construed independently of the note it replaced.[9] The note sued upon herein varied the terms of the original notes, since it carried a different rate of interest from that specified in

[8] In the case of a formal renewal contract, the rule of the Restatement is that "the place of contracting is where the new document is at the time when the old contract ceases to exist by the law of the place of its performance" (Sec. 313).

[9] *Siemans & Halski Electric Co.* v. *Ten Broek*, 97 Mo. App. 173, 175–176 (1902); *Cantley* v. *Plattner*, 228 Mo. App. 411, 419 (1934). Cf. *Walker* v. *Dunham*, 135 Mo. App. 396, 409 (1908). The surrender of an accommodation note prior to negotiation does not, of course, constitute consideration for a renewal. *Farmers Bank* v. *Harris* (Mo. App.), 250 S. W. 946 (1923); *Ford* v. *Ford Roofing Products Co.* (Mo. App.), 285 S. W. 538, 541 (1926); *Massa* v. *Huehnerhoff* (Mo. App.), 59 S. W. (2d) 723, 725 (1933).

one of them, contained a provision for attorneys' fees not found in either of the original notes, and was made payable in Illinois. Hence it is reasonable to suppose that the Missouri courts would treat the note as one standing on its own, as did the courts below (R. 75, 89), and would determine the applicable law accordingly, especially since the note was negotiated and the originals had not been and hence never became contracts (footnote 6, *supra*, p. 19).

II

THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE OF THE LAW OF ILLINOIS WITHOUT PLEA OR PROOF NOTWITHSTANDING THE MISSOURI RULE THAT JUDICIAL NOTICE MAY BE TAKEN OF THE LAWS OF SISTER STATES ONLY IF PLEADED

As its principal contention, at least in point of novelty, petitioner urges (Pet. 3–4, 5, 15–20) that in any event the court below erred in applying Illinois law when such had not been pleaded or proved in the district court. The basis of this argument is that in the Missouri courts the laws of sister states, unless pleaded and proved, are presumed to be the same as those of Missouri, and that this rule is one of substance and hence within the scope of *Erie R. Co.* v. *Tompkins*.

In its petition for certiorari (pp. 4, 6, 17), petitioner invoked the decision of the Circuit Court of Appeals for the Third Circuit in *Waggaman* v. *General Finance Co.*, 116 F. (2d) 254, as authority in conflict with the holding of the court below. A

subsequent decision of the Third Circuit, however, holds that the power of the federal courts to take judicial notice of the laws of the states is unaffected by the doctrine of the *Tompkins* case. *Gallup* v. *Caldwell*, 120 F. (2d) 90, 93–94. See also *Cray, McFaun & Co.* v. *Hegarty & Co.*, 27 F. Supp. 93–95 (S. D. N. Y.). To the extent that the *Waggaman* decision conflicts with that of the court below and has not been overruled, we submit that it should be disapproved.

A. THE FEDERAL COURTS HAVE HERETOFORE TAKEN JUDICIAL NOTICE OF THE LAWS OF THE SEVERAL STATES. AS A GENERAL RULE THE STATE COURTS OF MISSOURI, HOWEVER, MAY NOTICE THE LAWS OF A SISTER STATE ONLY IF PLEADED

For over a century, at least since *Owings* v. *Hull*, 9 Pet. 607, 625 (1835), it has been settled that in cases arising in the federal courts: "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof". *Lamar* v. *Micou*, 114 U. S. 218, 223; and cases cited in the footnote.[10] See also *Course* v. *Stead*, 4 Dall

[10] *United States* v. *Turner*, 11 How. 662, 668; *Pennington* v. *Gibson*, 16 How. 64, 81; *Cheever* v. *Wilson*, 9 Wall. 108, 121; *Brown* v. *Piper*, 91 U. S. 37, 42; *Elwood* v. *Flannagan*, 104 U. S. 562, 568; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Roberts* v. *Reilly*, 116 U. S. 80, 96; *Fourth National Bank* v. *Franklyn*, 120 U. S. 747, 751; *Gormley* v. *Bunyan*, 138 U. S. 623, 635; *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296; *Mills* v. *Green*, 159 U. S. 651, 657; *Bowen* v. *Johnston*, 306 U. S. 19, 23.

22, 27 (1800). In the federal courts questions both as to the "existence" (*Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 269, 277) and as to the interpretation of the laws of any state (*United States* v. *Turner*, 11 How. 663, 687–688) are for the courts. And since the laws of every state are regarded as "domestic laws" (*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 448; cf. *Hanley* v. *Donaghue*, 116 U. S. 1, 6), their "existence" and legal effect may be proved by judicial notice.

Application of the Federal rule accordingly has not been dependent upon the existence of a similar one in the state of the forum, but has generally been without regard to whether state courts would take judicial notice. The rule antedates *Swift* v. *Tyson*, 16 Pet. 1 (1842), and the Court has indicated its continued adherence to it after the decision in the *Tompkins* case. *Bowen* v. *Johnston*, 306 U. S. 19, 23. The only exception to the rule has been that on appeal from or writ of error to a state court which treats the laws of other states as matters of fact to be alleged and proved, this Court does not take judicial notice, but determines the validity of the decision of the state court on the same facts and law as were available to it. *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Adam* v. *Saenger*, 303 U. S. 59, 63. Obviously the exception is not applicable in the instant case.

The Missouri rule differs from the federal. Prior to 1927 it was necessary in the courts of

that state to prove as a "fact" the existence of any sister state law relied upon, as in the case of the law of a foreign country. Because sister state law was regarded as a "fact" which the local courts were not presumed to know, it was required to be pleaded to the same extent required by local pleading practice in the case of other facts not judicially noticed. The requirement of pleading and proof was not a rule of conflicts; it became an issue only after the Missouri court had ascertained that the law of some other state was applicable.[11]

The rule was not based on the view that the jury was best qualified to pass on questions of sister state law. While the existence of such law was viewed as a question of fact necessary to be proved to the jury, the construction and proper application of it, apparently including nonstatutory decision law, was recognized to be a matter of law to be decided by the court.[12] And where the law was shown by

[11] *Charlotte* v. *Choteau*, 25 Mo. 465, 473 (1857); *Charlotte* v. *Choteau*, 33 Mo. 194, 200 (1862); *Meyer* v. *McCabe*, 73 Mo. 236, 240 (1880); *McDonald* v. *Life Ass'n*, 154 Mo. 618, 628 (1900); *Coleman* v. *Lucksinger*, 224 Mo. 1, 14 (1909); *Norman* v. *Insurance Co.*, 237 Mo. 576, 583–584 (1911); *Rashall* v. *Railroad*, 249 Mo. 509, 516–517 (1913); *Banchor* v. *Gregory*, 9 Mo. App. 102, 104 (1880); *Flato* v. *Mulhall*, 72 Mo. 522, 525 (1880); *Sloan* v. *Terry*, 78 Mo. 623, 625 (1883); *Adamson* v. *Fogelstrom*, 221 Mo. App. 1243, 1246 (1927).

[12] *Slaughter* v. *Railroad*, 116 Mo. 269, 277 (1893); *Cobb* v. *The Griffith & Adams Co.*, 87 Mo. 90, 94 (1885); *Lowry* v. *Fire Ins. Co.*, 219 Mo. App. 121, 127 (1925); and cases cited in the preceding footnote.

uncontradicted documentary evidence, even its existence might be declared by the court. *Lowry* v. *Fire Ins. Co.*, 219 Mo. 121, 127; cf. *Charlotte* v. *Choteau*, 33 Mo. 194, 200 (1862). Nor was the rule based on any necessity of authenticating the printed reports of common law decisions and statute books commonly resorted to in proof of state law; printed reports of decisions were always admissible (*Charlotte* v. *Choteau*, 33 Mo. 194, 201) and, at least by statute, statute books of sister states purporting to be officially printed have likewise long been admissible. Mo. Rev. Stat., 1855, p. 723, sec. 2. As pointed out hereinafter (p. 40), it seems clear that the Missouri common law rule was based, as were similar rules elsewhere, on the early inaccessibility of the laws of other states.

In 1927, in recognition of present day conditions, Missouri enacted a statute (Laws 1927, p. 156; R. S. 1929, sec. 806) providing as follows:

> "Judicial Notice of Statutes and Decisions of Other States.—In every action wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state."

Under this provision, if the statutory or common law of a sister state is pleaded, proof of it is unnecessary; judicial notice will be taken both of it and of decisions pertinent to it even though the latter are not pleaded. *Ramey* v. *Missouri*

Pac. R. R. Co., 323 Mo. 662, 675–676 (1929); *Menard* v. *Goltra*, 328 Mo. 368, 379, 380 (1931). However, if the law is not pleaded, it may not be noticed (*Gorman* v. *Terminal Ry. Co.*, 325 Mo. 326, 332–333 (1930); *Menard* v. *Goltra, supra*), unless the defect of pleading is waived by the parties. *Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675–676; *Neff* v. *Sovereign Camp, W. O. W.*, (Mo. App.) 48 S. W. (2d) 564, 570 (1932).

In the instant case Illinois law was not pleaded and there was no express waiver, although petitioner's memorandum (p. 7) in the district court, without raising the pleading point, alternatively argued that Illinois law precluded recovery. Cf. *Ramey* v. *Missouri Pac. R. R. Co., supra.* There may thus be presented the question whether the courts below were compelled by the doctrine of the *Tompkins* case to depart from the sensible and long-standing federal practice permitting and bind them to take judicial notice and were required instead to apply the rule of Missouri which its own highest court has called "absurd" and "archaic." *Gorman* v. *Terminal Ry. Co., supra.*

B. THE DOCTRINE OF *ERIE R. CO.* V. *TOMPKINS* DID NOT PRECLUDE THE COURTS BELOW FROM TAKING JUDICIAL NOTICE OF THE ILLINOIS LAW IN ACCORDANCE WITH TRADITIONAL FEDERAL PRACTICE

Petitioner contends (Pet. 16–20) that the underlying policy of the doctrine of the *Tompkins* case is to assure a uniformity of decisions as between state and federal courts sitting within the same

state and that under a proper application of the doctrine to effectuate this policy the courts below were required to disregard Illinois law and reach their decision solely upon the basis of the law of Missouri.

It is true that the rule of the *Tompkins* case is regarded as being based upon "the principle of uniformity" and the policy of "equal administration of justice in coordinate state and federal courts sitting side by side." *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 180. However, the rule does not go so far as to require that the federal courts must in all cases of non-federal law limit themselves to exercise of the same powers as could be exercised by the local state courts if to do otherwise would lead to a different result than would be reached in the latter. Thus the rule has been said not to extend to so-called matters of "procedural law". *Sibbach* v. *Wilson & Co.*, 312 U. S. 1. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 209. If the Missouri law precluding judicial notice in the absence of pleading were to be categorized as procedural rather than substantive for purposes of the *Tompkins* rule, the decision below accordingly would be affirmed.[13]

[13] The Supreme Court of Missouri has said that the judicial notice statute of 1927 states "a rule of procedure" and "only saves trouble, volume, and circumstantiality in pleading." *Maynard* v. *Goltra*, 328 Mo. 368, 381 (1931).

Otherwise put, it might be said that the Missouri rule could ordinarily have no material bearing on the outcome of litigation and that therefore the purpose of the *Tompkins* doctrine would not require that the federal courts be bound by the rule. Cf. Tunks, *Categorization and Federalism,* 34 Ill. L. Rev. 271, 278, 282, 301; Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 Yale L. J. 333, 346; cf. *Coca-Cola Bottling Co.* v. *Munn,* 99 F. (2d) 190 (C. C. A. 4); *Sampson* v. *Channell,* 110 F. (2d) 754, 759–762 (C. C. A. 1). The plaintiff's opportunity of choosing the federal court would not of itself enable him to secure a more favorable decision than he could in the state court, since by a proper pleading in the latter he could assure that his rights would be determined by the same substantive law as would be applied in the federal court.

A closer analysis of the problem in the light of the scope of the Missouri and federal rules, respectively, will serve to strengthen the conclusion that petitioner's contention is untenable.

1. *The Missouri statute abrogated the common law requirement that the laws of sister states must be proved by the introduction of evidence, and left only the pleading requirement, which is inapplicable in the federal courts*

If the subheading is an accurate statement, as we submit that it is, the court below was clearly entitled to take judicial notice of the law of Illi-

nois. The situation would be the same as in a case where the statute of the state of the forum authorizes the taking of judicial notice but contains no provision as to pleading and is construed not to abolish the common law pleading requirement. Cf. *Richards* v. *Richards*, 270 Mass. 113 (1930); *Savannah Ry.* v. *Evans*, 121 Ga. 391 (1904). In such a case the pleading requirement presumably would be regarded as separable from the statutory authority to take judicial notice.

While the Missouri statute (*supra*, p. 26)[a] in terms purports to make the pleading of a sister state law a condition of resort to the statutory method of establishing or proving such law, as construed by the local courts its sole effect is to leave untouched the common law on the subject of pleading and to negative the conclusion which might otherwise have been drawn that because the "fact" could be noticed it need not be pleaded. Cf. *Loranger* v. *Nadeau*, 215 Cal. 362 (1932). The local decisions clearly indicate that where, under local pleading principles independent of the statute, failure to plead a sister state law may be deemed to be waived, judicial notice may be taken. *Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675–676 (1929); *Neff* v. *Sovereign Camp, W. O. W.* (Mo. App.), 48 S. W. (2d) 564, 570 (1932). And while the question has not and probably could not arise in the local courts, there is no reason to believe that they

would reach a different result where the federal pleading rules render the entire local pleading practice inapplicable. Cf. *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296. The Missouri decisions cited make the reach of the pleading requirement depend on considerations applicable to pleading generally, not on those which underlie the particular method of proving "facts" of sister state law,[14]

In the view that the pleading requirement is separable and is all that remains of the Missouri common-law rule, there can be no serious question under the *Tompkins* case. It may not be contended that the Conformity Act (R. S. S. 914, 28

[14] Under Missouri common law, if the law of a sister state is a "substantive" or ultimate fact in the case, it must be pleaded, but not if it is only "evidentiary". *Banchor* v. *Gregory*, 9 Mo. 102, 104; see *Rashall* v. *Railroad*, 249 Mo. 509, 516. If "substantive" and not pleaded, it could not be proved on objection (*McDonald* v. *Life Ins. Co.*, 154 Mo. 618, 628), but like the failure to plead any other fact, the defect might be waived (*Ramey* v. *Mo. Pac. R. R. Co.*, 323 Mo. 662, 675; *Lowry* v. *Fire Ins. Co.*, 219 Mo. App. 121, 127). Whether "substantive" or "evidentiary", however, it was required to be proved since the court could not judicially notice "foreign" laws. *Rashall* v. *Railroad*, *supra*. On the other hand, the fact that the "common law" system prevails in Illinois may be judicially noticed and for such reason, apparently, this "fact" need not be pleaded; accordingly, applying the presumption that the Illinois common law is the same as in Missouri, the law of the latter will be enforced where as a matter of conflicts of law Illinois law is applicable and its common law rule is involved. *Rashall* v. *Railroad*, *supra*, at 517.

U. S. C., sec. 724) is applicable,[15] and this Court repeatedly has declared that the Rules of Decision Act (R. S. § 721, 28 U. S. C., sec. 725) does not apply to matters normally subsumed under the head of pleading, practice, and procedure. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *United States* v. *Eckford*, 6 Wall. 484, 490.

That such matters were not intended to be included within the coverage of the latter Act is evident from the fact that contemporaneously they were dealt with in other statutes.[16] It is true that the Act has been held to apply to questions of evidence (*McNiel* v. *Holbrook*, 12 Pet. 84, 88–90; *Sims* v. *Hundley*, 6 How. 1) and that such ques-

[15] While the decisions of this Court holding that the federal courts may take judicial notice of the laws of the states have not referred in terms to the Conformity Act, they must be taken to hold that that statute does not require a contrary conclusion. And no principle of constitutional power or statutory construction can be suggested which would warrant a reconsideration of this question as an original one at the present time. The Act required conformity only "as near as may be" and exceptions were numerous. Moreover, the Act was repealed in large measure, if not wholly, by the promulgation of the Federal Rules of Civil Procedure under the Act of June 19, 1934 (48 Stat. 1064, 28 U. S. C. 723). See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10; Moore, *Federal Practice* (1938), p. 36; Tunks, *supra*, 288–290.

[16] Under The Process Acts of 1789 and 1792 (1 Stat. 93, 275, 276), the state practice and procedures of the state in which the federal court sat was made "applicable to every step taken in a cause * * * from its commencement to its termination" and to "the whole progress of the suit, and every transaction in it, from its commencement to its termination." *Wayman* v. *Southard*, 10 Wheat. 1, 27–29, 32.

tions, which are governed by the *lex fori* in the Anglo-American law (see Wigmore, *Evidence* (3d Ed.) sec. 5), may well be deemed "procedural" for many purposes, including judicial rule-making. See Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L. J. 622; Moore, *Federal Practice* (1938), pp. 41–42. But the Act never has been deemed applicable to questions of pleading. Cf. *United States* v. *Eckford*, *loc. cit. supra*; Simkins, *Federal Practice*, pp. 9–10.[17]

Moreover, the Federal Rules of Civil Procedure deal extensively with the subject of pleading (see Rules 7–12, 15; cf. Rule 16), and must be deemed to have been intended to provide the exclusive rule for pleadings in the federal courts. In line

[17] It is arguable that the same view may be reached on the ground that the Rules of Decisions Act applies only to matters of substantive right and merely announces the rule which would have been applicable in its absence. See *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 464; *Mason* v. *United States*, 260 U. S. 545, 559. This view finds support in the rationale of the *Tompkins* case and in the decision in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10–11, 13n. Such a limitation of the Rules of Decision Act, however, is very questionable, since it is settled that the Act requires the application of state statutes of limitations and rules of evidence, even where the substantive right and judicial jurisdiction is exclusively federal. *Campbell* v. *Haverhill*, 155 U. S. 610, 614–617. See also *McElmoyle* v. *Cohen*, 13 Pet. 312, 327; *Bauserman* v. *Blunt*, 147 U. S. 647, 652; *Brady* v. *Daly*, 175 U. S. 148, 158. And such a limitation is obviously inconsistent with the rule that the local conflicts rule is controlling. *Klaxon* v. *Stentor Co.*, *supra*.

with the abandonment of the notice pleading theory, the rules abolish the necessity of pleading all ultimate facts (see Rule 8) and favor the use of extremely general pleadings (see official Forms, Nos. 1-9), relying on other devices for the clarification of issues (see, e. g., Rule 16). The federal pleading system therefore is wholly incompatible with any state pleading system which, like that of Missouri, is based on the fact-law distinction from which the requirement of pleading the "fact" of the law of sister states is derived. The rules contemplate the possibility that an "official document or official act" may sometimes have to be pleaded (Rule 9 (d)), but this description hardly comprehends a state statute or decision invoked as the rule of any decision; any requirement of pleading such law must be derived, if at all, from the federal rules. No contention is made here that they impose any such requirement and, in view of the long established federal doctrine dispensing with such pleading, and in view of the purpose of the rules to simplify pleading practice, they cannot reasonably be construed to require an allegation of the laws of any state.

2. *Even if the abrogation of the Missouri common law rule of proof is conditioned upon the pleading of sister state law, the Tompkins doctrine did not preclude the federal courts from taking judicial notice of the Illinois law*

Alternative reasons why the above-stated result should be reached are (a) that since the ascertain-

ment of the law of any state as construed by its courts has been an historical function of federal judges and is a desirable one, neither the Rules of Decision Act nor the Constitution should be construed to limit them in the sources they may consult in performing this function; (b) that in the event they are limited by the rule of any state, it should be the rule of the state whose law is involved, in this case Illinois; and (c) that if the *lex fori* is chosen, it should be construed to permit the federal courts to notice the law of any state as "domestic" law. The Federal Rules of Civil Procedure, it should be noted, do not expressly touch the question of when a "fact" may be noticed without evidence, although the liberal rule (Rule 43 (a)) as to the form and admissibility of evidence provides that "the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed * * *".

(a) The conclusion that the federal courts are not compelled by any existing statute or by the Constitution to close their eyes to applicable state laws when there is a local rule requiring the state courts of the forum to do so finds support in the rule, consistently sustained by this Court without dissent, that state statutes which regulate the relations of court and jury and the exercise of judicial discretion in such matters are beyond the purview of the Conformity and Rules of Decision Acts and

need not be followed. In the most recent case on the subject, *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, the Court held that a provision of a state constitution which required the submission of the issue of contributory negligence to the jury in all cases was inapplicable in the federal courts and that the latter were free to direct a verdict in the exercise of their independent judgment. The Court said (pp. 94–95):

> The controlling principle * * * is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the "rules of decision" Act. Thus, a federal court is not subject to state regulations * * * providing that the court shall not give an instruction to the jury unless reduced to writing, or that written instructions shall be taken by the jury in their retirement (*Nudd* v. *Burrows*, 91 U. S. 426, 441, 442; *Lincoln* v. *Power*, 151 U. S. 436, 442); or that the court shall require the jury to answer special interrogatories in addition to their general verdict (*Indianapolis & St. Louis R. Co.* v. *Horst*, 93 U. S. 291, 300); or that the court shall not express any opinion upon the facts (*Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U. S. 545,

553), or charge the jury with regard to matters of fact (*St. Louis, Iron Mountain & Southern Ry. Co.* v. *Vickers*, 122 U. S. 360, 363); or shall not direct a verdict where the evidence is such that a verdict the other way would be set aside (*Barrett* v. *Virginian Railway Co., supra*).

No reason can be suggested why the power of a federal court to take judicial notice without plea or proof should be regarded as being any less independent of state law than is its power to direct a verdict or otherwise superintend the jury.[18] In ascertaining and determining the existence or construction of a "law" the federal courts have usually considered that they are at liberty to consult whatever sources they deem accessible and reliable, without regard to whether the local courts would take the trouble to do likewise. See *Gardner* v. *The Collector*, 6 Wall. 499, 511; *Brown* v. *Piper*, 91 U. S. 37, 41; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; cf. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 268–269, 277 n. This Court has assumed as much in taking judicial notice of state laws without reference to the local state practice. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Lamar*

[18] Neither in the *Herron* case nor in any of the cases cited therein did the Court base its decision on the constitutional requirement of trial by jury, and it is unlikely that such requirement would have precluded application of each of the state laws involved. Cf. *Patton* v. *United States*, 281 U. S. 276, 288.

v. *Micou,* 114 U. S. 218, 223; *Owings* v. *Hull,* 9 Pet. 607, 625.

Concededly there is precedent that in some circumstances state judicial-notice laws should be followed. This is found in cases where the question was whether a state act of the forum was "private" as distinct from "public" and hence not within the usual scope of the federal judicial notice rule (see *Leland* v. *Wilkinson,* 6 Pet. 317, 321), and where application of the state rule had the effect of permitting judicial notice to be taken. See *Railroad Co.* v. *Bank of Ashland,* 12 Wall. 226, 230; *Covington Drawbridge Co.* v. *Shepherd,* 20 How. 227, 232; *Case* v. *Kelly,* 133 U. S. 21, 27–28. The decisions in these cases can be interpreted to require that the rules of the state whose "substantive" law is concerned should be followed on the question whether the text is authentic, on the ground that it is necessary to do so in order to enforce the "substantive" law of such state. Cf. *Town of South Ottawa* v. *Perkins,* 94 U. S. 260, 268–269, 277, *n.*; *McNiel* v. *Holbrook,* 12 Pet. 84, 88–90; see *infra,* p. 41. They should have no bearing, however, where, as here, the law involved is regarded as a "public" law in the state of its origin as well as elsewhere, is set forth in undeniably authentic printed volumes, and there is no question of availability.[19]

[19] The opinion in *Town of South Ottawa* v. *Perkins, supra,* expressly declares that the federal court may notice and examine a state law even though the courts of that state would

Absurdities would ensue if the *Tompkins* doctrine were extended to compel the federal courts to follow local rules which would preclude them from taking judicial notice of the laws of sister states. Such an extension could only be based on the theory that state law is controlling on all rules of evidence not covered by federal statute. If so, it would seem in principle that the same law would govern the power to take judicial notice in many cases involving federal questions where this Court has in the past informed itself by such means as it deemed best, without regard to local state practice on like matter. It would in principle apply to the scope of judicial notice in cases involving political questions, where this Court has heretofore felt free to consult the State Department (Cf. *Jones* v. *United States,* 137 U. S. 202, 216), and perhaps even in cases involving constitutional questions turning on issues of fact. Cf. *Chastelton Corp.* v. *Sinclair,* 264 U. S. 543, 548.

Other absurd consequences readily suggest themselves. This Court has frequently taken judicial notice of its own records and held that other fed-

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not trouble to do so unless the law was called to their attention by formal proof, and the statement that a state may declare what shall be taken as conclusive evidence of the local law apparently does not mean that such "evidence" may not be examined by the federal court unless it is formally read into the record. 94 U. S. at 268–269. The subsequent direction issued by the Court in that case was plainly not intended to modify the original opinion. *Id.* at 277, n.

eral courts may do likewise. See, e. g. *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 336; *Freshman* v. *Atkins,* 269 U. S. 121; *Dimmick* v. *Tompkins,* 194 U. S. 540. The rule in Missouri is otherwise (*State ex rel St. Joseph Water Co.* v. *Eastin,* 270 Mo. 193; *Banks* v. *Burnam,* 61 Mo. 76) ~~(1875,~~ but it is inconceivable that the federal courts could be required to consult state practice on this matter. If they must, the consequence might be that in many states the federal courts could notice records of the state courts (because the latter could), but could not notice their own records (because the state courts could not). Similar absurdities would arise where state and federal practice differed as to the scope of judicial notice in the case of federal or state administrative regulations or decisions.

The fact is that the rule of one court as to judicial notice of state laws has very little practical relevance in any other court. The requirement of proof is not based on doubts as to the authenticity of the copies of the statutes or decisions of the other states. In Missouri and elsewhere purported official and even privately printed copies of judicial decisions are admissible (*Charlotte* v. *Chouteau,* 33 Mo. 194, 201; Mo. Rev. Stat. 1919, sec. 5388), statutes purporting to be officially printed are likewise admissible (Mo. Rev. Stat. 1919, sec. 5336; see Wigmore, *supra,* at sec. 1684), and the state courts frequently refer to the decisions and

statutes of other states in construing their own laws. Undoubtedly the only basis of the rule requiring evidence was that for some time copies of the state decisions and statutes of sister states were not readily accessible. See *Motor Co.* v. *Warren*, 113 Kansas 44, 46; (Note) 46 Harv. L. Rev. 1019. Cf. Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 47 Yale L. J. 194, 211–212. Whether any state court should adhere to the rule after the reason for its existence has disappeared is a question for such court to decide for itself. But a consideration of the original basis of the rule is persuasive that it has no application to a court which is satisfied that it has sufficient access to the relevant state statutes and decisions.

(b) If the rule of some state must be applied notwithstanding the foregoing considerations, it should be the rule of the state whose law is involved.[20] In the only case heretofore decided by this Court in which it appeared that a choice of state rules on judicial notice would have made any difference, the Court indicated that it would choose the rule of the state whose law would be applied. *Pennington* v. *Gibson*, 16 How. 64, 75, 80-81. There is nothing in the Rules of Decision Act to require a contrary conclusion and every consideration of practical convenience favors it.

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[20] The courts of Illinois, of course, may notice Illinois laws both written and unwritten, without plea or proof. L. 1929, p. 466.

The Act does not specify which state law shall be applied. It merely declares that the laws of the "several states" shall be regarded as rules of decision "in cases where they apply." The language of the statute in this respect stands in marked contrast to that employed in statutes making state law applicable in matters of practice, procedure, etc. In the case of every such statute which has come to our attention the Congress specifically made applicable the law of the state in which the federal court is sitting. This is true, for example, of the Process Acts of 1789 and 1792 (1 Stat. 93, 275–276) and also of the Conformity Act. It thus seems clear that in the Rules of Decision Act Congress left it open to the courts to choose the state, if any, whose law should be applied.

The opinion in the *Klaxon* case, as we read it, lends support to this view. The decision was premised in the view that both New York and Delaware could lawfully enforce their own rules of law and notions of policy, and the Court did not purport to find any provision in the statute which prescribed an exclusive rule as a basis for making a choice of such state laws by the federal courts. The decision was not based on the provisions of the Rules of Decision Act; the statute was not even mentioned in the opinion. The Court adopted the view that in diversity case the federal courts sit to administer the law of the particular states in

which they sit, a view which accords with the purpose of the constitutional grant of jurisdiction to ensure equality to non-citizens, not inequality to citizens. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 83–84.

The policy considerations which underlie the rule of the *Klaxon* case are not of universal application, however. Thus it is well settled that the Rules of Decision Act requires the application of state statutes of limitation and rules of evidence even in cases where the substantive right to be enforced is federal in origin and the jurisdiction of the federal courts is exclusive. *Campbell* v. *Haverhill*, 155 U. S. 610, 614–617; *Brady* v. *Daly*, 175 U. S. 148, 158; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *O'Sullivan* v. *Felix*, 233 U. S. 318, 322; *Vance* v. *Campbell*, 1 Black 427; *Wright* v. *Bales*, 2 Black 535. These decisions proceed on the view that a contrary conclusion would lead, in the statute of limitations cases, to the absurd conclusion that no limitation of time for commencement of actions would exist in the absence of a federal statute on the subject.

If the state law of the forum may be made applicable under the Rules of Decisions Act where no danger of inequality of justice in coordinate state and federal courts exists, by a parity of reasoning the law of the state whose substantive

law is being enforced may be selected as controlling where the choice of the *lex fori* would lead to an absurd result. Such would be the consequence of choosing the local *lex fori* here. See *supra,* pp. 38–40.[21]

(c) If, however, the *lex fori* must be applied, it should not be deemed to require a mechanically literal application. The rule in every state is that "domestic" law may be noticed. What is "domestic" law in the state courts is not necessarily "domestic" law in the federal courts. The state rule treating the laws of sister states as "foreign" law is derived from the theoretical legal independence of each of the sovereign states. But the relationship between the Federal Government and each of the states is not the same legal relationship as that of the respective states to each other. Each of the states is a component part of the Union, even though a sovereign entity distinct from every other state. If such technical considerations may govern the reach of judicial notice, as they have in the past, then they must be applied with reference to the "facts" of the legal situation (cf. Thayer, *Law and Fact in Jury Trials,* 4 Harv.

[21] In this connection, it may be noted that the first case to extend the Rules of Decision Act to matters of evidence proceeded on the ground that rules of evidence were so closely related to the enforcement of the substantive right that the latter could not be properly enforced unless the rules of evidence of the same state were also enforced. See *McNiel* v. *Holbrook*, 12 Pet. 84, 88–90; and *supra*, p. 38.

L. Rev. 147, 172) as it actually exists in the federal courts. The federal courts may sit to enforce the local state law, but they remain arms of the Federal Government, not of the states.

III

PETITIONER IS ESTOPPED TO DENY LIABILITY ON THE NOTE

We have thus far shown that the rights of the parties are governed by Illinois law and that therefore respondent has the status of a holder in due course and is entitled to recover even if the note was given without consideration. An alternative ground for affirmance of the judgment below, and one which involves no question of a remand, is that under federal statutory law, as well as under Illinois law which the Missouri courts would be bound to apply under the Full Faith and Credit Clause, petitioner is estopped to assert as a defense that there was a lack of consideration for the note or an agreement not to demand payment of it. The question arising under the federal statute is independent of any issue of Missouri law and hence may be sustained whether or not the Court upholds or passes upon Points I and II. *Deitrick* v. *Greaney,* 309 U. S. 190. The question arising under the Full Faith and Credit Clause may depend on the decision of Point II, since the Illinois law relied on was not pleaded or formally proved. Cf. *Gasquet* v. *Lapeyre,* 242 U. S. 367;

Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274, 279. The district court concluded that petitioner was estopped to assert want of consideration (R. 71). The court below did not decide the question.

The facts establishing an estoppel are as follows: On August 1, 1926, two bonds which petitioner had sold to the bank matured and were dishonored (R. 38, 42, 68). The bank, which for many years had been a customer of petitioner (R. 42), requested it to execute two demand notes in the respective amounts of the bonds for the accommodation of the bank, in order that the bank's records would not show any past due paper (R. 42–44, 47, 68, 71). Petitioner's representative in the negotiations understood what was meant by the bank's desire not to have past due paper showing on its books (R. 47, 68), and he knew that the bank, which was organized under the laws of Illinois (R. 15), was subject to periodic examination by the State Bank Examiner (R. 44). Petitioner's vice president also understood the purpose of the bank's request (R. 55). Yet he signed the notes which were asked (R. 57, 59).

Petitioner thereafter continued to do business with the bank (R. 42, 52, 68). It executed one or more renewal notes prior to the note sued upon, which was dated January 1, 1933, and was executed in compliance with a request from the bank that a new note should be given because the note

or notes then held had become too old (R. 35, 52, 70). Between August 1926 and March 1932 petitioner paid the bank $1,601.56 "interest" on the notes (R. 49, 69–70). Petitioner's vice president understood that these payments were made to enable the bank to show the note or notes as live assets (R. 55–56, R. 71). The bank intermingled the interest payments with its general earnings (R. 49, 70).

The note in controversy was not written off the bank's books until July 29, 1935 (R. 21, 70). Prior to that date, on January 1, 1934, respondent, on application of the bank, insured all deposits in the bank up to $5,000 (R. 28). Respondent was required by paragraph (y) of Section 12B of the Federal Reserve Act (Appendix, *infra*, pp. 59–61) to make an examination of the financial condition of all state banks prior to granting insurance and there is nothing to show that it failed to perform its official duty (see R. 28; *Deitrick* v. *Greaney*, 309 U. S. 190, 196. Thereafter, respondent twice examined the bank prior to the date on which the note was written off (R. 21). The bank's separate agreement not to enforce the note was at all times kept in petitioner's custody (R. 46) and respondent did not become aware of it until demand was made on the petitioner for payment in 1938 (R. 61, 69). At no time did petitioner warn either the state banking authorities or respondent of the true character of the note (R. 52, 56, 69, 71).

On these facts, which we believe will not be disputed, petitioner is estopped to deny liability. This is so both under federal and Illinois statutory law applicable whatever the law of Missouri may be.[22]

1. *Petitioner is estopped under federal statutory law*

The statutory basis for an estoppel under federal law is found in Section 12B of the Federal Reserve Act (Appendix, *infra*, pp. 58–61) providing for federal insurance of bank deposits. Section 12B was added by the Banking Act of 1933 (48 Stat. 162) which dealt primarily with the insurance of deposits in national banks and state banks which were members of the Federal Reserve System. Subdivision (y) provided that state banks which were not members of the Federal Reserve System could be admitted to the benefits of the insurance only upon approval of state authorities having supervision of such state bank, certification by such authorities that the bank was in a solvent condition, examination by and approval of respondent, and agreement to comply with the re-

[22] If the decision in *Chicago Title & Trust Co.* v. *Brady*, 165 Mo. 197 (1901) were applicable, petitioner would not be estopped according to Missouri law. However, the opinion in *Bank of Slater* v. *Union Station Bank*, 283 Mo. 308, 319 (1920), indicates that the *Brady* decision might well be overruled if the opportunity were presented. See also *Lewis* v. *McMahon & Co.*, 307 Mo. 552, 574 (1925).

quirements of respondent. Subdivision (s) made it a criminal offense for anyone to overvalue any security wilfully for the purpose of influencing the action of respondent.[23]

Inasmuch as the Belleville Bank & Trust Company, a nonmember state bank, was insured on January 1, 1934, it may be presumed that prior

[23] Section 12B was amended by the Banking Act of 1935 (49 Stat. 713, 12 U. S. C. 264), enacted August 23, 1935. Subdivision (e) (2) of the amended Act provides that every national bank and every state bank which is a member of the Federal Reserve System shall be an insured bank. Subdivision (f) (1) provides that every state bank which was insured on June 30, 1935, should without more continue to be an insured bank. Subdivisions (f) (2) and (g) provide that, in all other instances, before a state bank may become an insured bank, its application must be accepted by respondent, which must give consideration to the financial history and condition of the bank, the adequacy of its capital structure and its future earning prospects, the general character of its management and the needs of the community which it serves. Subdivision (r) (1) provides that when respondent finds an insured state bank has conducted unsafe or unsound practices, or has negligently permitted any of its officers or agents to violate any provision to which the bank is subject, notice thereof shall be given to the state authority having supervision of the bank. If the practice or violation is not corrected, respondent may terminate the status of the bank as an insured institution. Subdivision (k) (2) provides for the thorough examination of all insured banks and for full and detailed reports. Subdivision (u) makes it a criminal offense to practice deceit upon any officer, auditor, or examiner of respondent. Subdivision (v) (7) authorizes the publication of reports criticizing the practices of insured banks when such practices are not corrected. The provisions of the original subdivision (y) were dropped and those of (s) were retained.

to that date the state authorities had certified that the bank was in a solvent condition, and that an examination by respondent had been made as the Act required. See *Deitrick* v. *Greaney*, 309 U. S. 190, 196; F. D. I. C. Annual Report, 1934, pp. 14, 15. Whether or not respondent placed any reliance on the instant note in insuring the bank, however, is immaterial, as is the question whether respondent or any creditor was damaged as a result of the bank's obtaining or use of it. *Deitrick* v. *Greaney, supra.*

In the *Deitrick* case this Court held that the maker of an accommodation note executed to conceal a stock purchase transaction forbidden by the National Banking Act was estopped on the ground of public policy to deny lack of consideration in a suit by a receiver of the payee national bank. Specifically rejecting the argument that it was necessary to prove an equitable estoppel, the Court held that "It is the evil tendency of the prohibited acts at which the statute is aimed, and its aid, in condemnation of them, and in preventing the consequences which the act was designed to prevent, may be invoked by the receiver representing the creditors for whose benefit the statute was enacted" (309 U. S. at 198–199).

In the *Deitrick* case, it is true, reliance was placed on the fact that the maker of the note was a participant in an illegal transaction. However, the Court did not base its decision on the ground

that the execution of the note, as distinguished from the bank's purchase of its stock, was within the express condemnation of the statute. In concluding that the concealment of the stock purchase by means of an accommodation note was unlawful, the Court relied on the purposes of the Act to prevent impairment of the capital resources of national banks and to insure prompt discovery of violations through periodic examinations and reports (309 U. S. at 195). Moreover, in deciding that the question presented was federal in character, the Court recognized that the "extent and nature of the legal consequences" of the implied statutory condemnation of the transaction in controversy were "left by the statute to judicial determination" in the light of the federal policy adopted in the Act. *Id.*, at 200–201; cf. *Board of County Commissioners of County of Jackson* v. *United States*, 308 U. S. 343, 349–351; *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 214. The broad scope of the decision is made additionally manifest by the Court's reliance on a number of state decisions applying an estoppel in analogous circumstances (309 U. S. at 198). The policy and purposes, rather than the express prohibitions, of the state banking laws constitute the basis for the estoppel doctrine announced in these decisions.

If in the instant case the note had been executed subsequent to the enactment of Section 12B,

the decision in the *Deitrick* case would be clearly applicable. The provisions of Section 12B, construed to effectuate their purpose, impliedly forbid a promisor from denying liability as against respondent or its transferees on any transaction which was intended to misrepresent the true financial condition of an applicant for insurance or of an insured bank. The record shows that petitioner knew that the bank's design in obtaining and retaining the note was to have it, instead of the dishonored bonds, appear among the bank's assets (*supra*, pp. 45–46). And the inference is inescapable that petitioner's action in executing and delivering the note was intended to assist in concealing the true condition of the bank. An intent to deceive respondent or any other particular agency or person need not be proved. *Golden* v. *Cervanka*, 278 Ill. 409, 427 (1917). The "evil tendency" of the transaction to mislead banking authorities or others is sufficient. The danger of misleading the state authorities in this case would be especially pertinent, since Section 12B contemplated that respondent in issuing insurance to the bank would rely upon a certificate of solvency furnished by the state banking authorities as well as upon its own investigations.[24]

[24] The importance of state certificates is emphasized by the general scheme of the Banking Act of 1933. That Act contemplated that insured banks ultimately would be either national banks or members of the Federal Reserve System. Those classes of banks were already subject to adequate

The question whether petitioner is estopped under federal law thus turns on the significance of the fact that the note was executed prior, rather than subsequent, to the enactment of Section 12B. We submit that this fact is immaterial since the considerations of policy similar to those which were decisive in the *Deitrick* case are equally applicable in the circumstances of this case. Petitioner placed no limitation on the bank's use of the note. Cf. *Iglehart* v. *Todd*, 203 Ind. 427, 442 (1931); *State Bank* v. *Forsyth*, 41 Mont. 249, 270–71 (1910). Moreover, neither before nor after the adoption of Section 12B did petitioner notify any state or federal authority of the true character of the note or take any other effective step to assure that the bank would not succeed in misrepresenting its financial condition through use of the note. The statute should be construed in the light of relevant judicial doctrine (see *Deitrick* v. *Greaney*, 309 U. S. 196, 200–201), and it is a famil-

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federal supervision, and it was unnecessary for the corporation to examine them. State nonmember banks were admitted to participation in the temporary insurance fund provided by Section (y) of the Act. Over half of the banks which became members in 1934 were state nonmember banks (F. D. I. C. Annual Rept., 1934, p. 176). Accordingly, it became necessary to assemble an examining force which had had widely divergent banking experience. By the end of 1933, 7,785 examinations had been conducted (*id.*, p. 15). In these circumstances, particular reliance was placed upon state certificates of solvency, as thereafter insurance was granted if the examination disclosed assets equalled liabilities (*id.*, p. 15).

iar principle that one who does an act which at the time involves no apparent risk of injury to another may be required to give warning when the danger of such injury becomes or should have become apparent. *Restatement of the Law of Torts*, § 321. This duty petitioner did not discharge (R. 53, 56), although concededly between 1930 and 1935 it several times endeavored to obtain a surrender of its notes from the bank in apparent recognition of the continuing risk it was taking, if not of the deception it had enabled.

A word should be added with respect to the effect of the bank's writing off of the note on July 29, 1935. It may be assumed that if the note had been written off prior to the application for insurance the effect might have been the same as the destruction of the instrument from the standpoint of the federal act. But the note was not written off until after respondent had insured the bank. The "evil tendency" of the note to mislead respondent in passing upon the application for insurance and in examining the bank in 1934 and 1935 (*supra*, pp. 46–47) obviously could not be undone by the subsequent writing off of the note.

2. *Petitioner is estopped also under Illinois law which the courts of Missouri would be bound to apply*

As a matter of Illinois law, petitioner likewise is estopped to deny liability. *Golden* v. *Cervenka*,

278 Ill. 409, 427 (1917); *Niblack* v. *Farley*, 286 Ill. 536, 540 (1919); *Central Republic Trust Co.* v. *Evans*, 307 Ill. App. 605, 641–643 (1940). As appears from the opinions in the cases cited, the basis of the Illinois rule, as in other states in which a like doctrine is enforced, is that the state banking statutes, which were in effect throughout the period involved in this case, construed in the light of their purpose and policy, impliedly preclude defenses such as that here asserted. This Court recognized as much in discussing the *Niblack* and similar decisions in the *Deitrick case*. 309 U. S. at 198. Compare *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554, 567–568 (1933). It is not controverted that the state statutory policy of protecting creditors and the public, on which the rule is based, is broad enough to include the protection of respondent as an insurer as well as others dealing with the bank on the strength of its ostensible sound condition.

Under the Full Faith and Credit Clause, the Illinois banking statutes, as thus construed, must be given effect by the state courts and therefore the federal courts in Missouri.[25] It is now settled that

[25] We have shown under Point II that the federal courts may take judicial notice of the laws of Illinois without plea or proof. The method of authentication provided by Congress where full faith and credit is sought (Rev. Statutes, secs. 905–906, 28 U. S. C. 687–688) is not exclusive. *Renaud* v. *Abbott*, 116 U. S. 277, 285; *Bothwell* v. *Buckbee, Mears Co.*,

a state statute is a "public" act within reach of the Full Faith and Credit Clause. *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, 183. Cf. *Alaska Packers Association* v. *Commission*, 294 U. S. 532; *Pacific Insurance Company* v. *Commission*, 306 U. S. 493; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145. And the statute must be enforced as construed by the courts of the enacting state. *John Hancock Ins. Co.* v. *Yates supra*, at 182–183; *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544.

It is true that courts are not required to give effect to a statute of a sister state which is in conflict with the domestic policy on a matter of local concern. *Klaxon* v. *Stentor Company*, 313 U. S. 487, 497–498; *Alaska Packers Association* v. *Commission*, 294 U. S. 532. The financial soundness of state banks of Illinois, however, is not of concern to Missouri. The latter might conceivably have a sufficient interest in determining whether one of its citizens or residents in fact participated in a transaction condemned by the Illinois banking laws. Cf. *Pink* v. *A. A. A. Highway Express, Inc.*, No. 48, this Term, decided December 8, 1941. But petitioner's participation is here estab-

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275 U. S. 274, 279 (1805); *Ohio* v. *Hinchman*, 27 Pa. 479 (1856); *Curtis* v. *Martin*, 2 N. J. L. 377; *Karr* v. *Jackson*, 28 Mo. 316 (1859).

lished; the sole question is the legal consequence of its admitted acts. And on this question Missouri has no interest whatever. Cf. *Pink* v. *A. A. A. Highway Express, Inc., supra.* There is not the slightest suggestion of such an interest in the Missouri cases heretofore cited by petitioner. The Missouri decisions (footnote 21, *supra,* p. 47) proceed on the technical ground that the receiver of a bank has no better right than the bank and that if the defense of no consideration would have been good against the bank, it is therefore available against the receiver. There is no indication of a domestic public policy in favor of encouraging deception or of protecting Missouri residents or citizens from the consequences of deception effected elsewhere. See *Chicago Title & Trust Co.* v. *Brady,* 165 Mo. 197, 209–210; *Farmers' Bank* v. *Harris,* Mo. App. 250 S. W. 946.

CONCLUSION

Although the court below did not purport to find the Missouri conflicts of law rule in accordance with the subsequent decision of this Court in the *Klaxon* case, it in fact correctly applied the rule, hence the error in not finding it was harmless. There is no occasion to delay final disposition of the case by remanding it for such a finding to be made. An independent reason for affirmance is that petitioner is estopped to deny liability on the note. Upon the

grounds stated the decision below is correct and should be affirmed.

Respectfully submitted,

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JANUARY 1942.

APPENDIX

Section 12B of the Federal Reserve Act, as added by Section 8 of the Banking Act of 1933, 48 Stat. 162, 168, 172, 177–178, 179, provides in part as follows:

> (a) There is hereby created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation"), whose duty it shall be to purchase, hold, and liquidate, as hereinafter provided, the assets of national banks which have been closed by action of the Comptroller of the Currency, or by vote of their directors, and the assets of State member banks which have been closed by action of the appropriate State authorities, or by vote of their directors; and to insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this section.
>
> * * * * * *
>
> (j) Upon the date of enactment of the Banking Act of 1933, the Corporation shall become a body corporate and as such shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession until dissolved by an Act of Congress.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal.
>
> Fifth. To appoint by its board of directors such officers and employees as are not

otherwise provided for in this section, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe by its board of directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted.

* * * * *

(s) Whoever, for the purpose of obtaining any loan from the Corporation, or any extension or renewal thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Corporation to purchase any assets, or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing it to be false, or willfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

* * * * *

(y) The Corporation shall open on its books a Temporary Federal Deposit Insur-

ance Fund (hereinafter referred to as the "Fund"), which shall become operative on January 1, 1934, unless the President shall by proclamation fix an earlier date, and it shall be the duty of the Corporation to insure deposits as hereinafter provided until July 1, 1934.

Each member bank licensed before January 1, 1934, by the Secretary of the Treasury pursuant to the authority vested in him by the Executive order of the President issued March 10, 1933, shall, on or before January 1, 1934, become a member of the Fund; each member bank so licensed after such date, and each State bank trust company or mutual savings bank (referred to in this subsection as "State bank", which term shall also include all banking institutions located in the District of Columbia) which becomes a member of the Federal Reserve System on or after such date, shall, upon being so licensed or so admitted to membership, become a member of the Fund; and any State bank which is not a member of the Federal Reserve System, with the approval of the authority having supervision of such State bank and certification to the Corporation by such authority that such State bank is in solvent condition, shall, after examination by, and with the approval of, the Corporation, be entitled to become a member of the Fund and to the privileges of this subsection upon agreeing to comply with the requirements thereof and upon paying to the Corporation an amount equal to the amount that would be required of it under this subsection if it were a member bank. The Corporation is authorized to prescribe rules and regulations for the further examination of such State bank, and to fix the compensation of

examiners employed to make examinations of State banks.

* * * * * *

REVISED STATUTES OF MISSOURI, 1929, SECTION 806.

Judicial Notice of Statutes and Decisions of Other States.—In every action or proceeding wherein the law of another state of the United States of America is pleaded, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. (Laws 1927, p. 156.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206.

D'OENCH, DUHME & CO., INC., Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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LIST OF CASES CITED.

	Page
Andresen v. Kaercher, 38 F. (2d) 462 (8th Cir.)	3, 4
Bank of Slater v. Union Station Bank, 283 Mo. 308	5
Chicago Title & Trust Co. v. Brady, 165 Mo. 197	5
Deitrick v. Greaney, 23 F. Supp., l. c. 759, and 103 F. (2d) 83	2
Deitrick v. Greaney, 309 U. S. 190, 84 L. ed. 694	4
Deitrick v. Standard Surety & C. Co., 303 U. S. 471, 82 L. ed. 962	4
Eckery v. Byng, 45 S. W. (2d) 924 (Mo. A. 1932)	5
Farm & Home Savings & Loan Assoc. v. Thiess, 111 S. W. (2d) 189, l. c. 190	6
Rankin v. City National Bank, 208 U. S. 541, 52 L. ed. 610	4
Stoner v. New York Life, 311 U. S. 464	6
West v. American Telephone, 311 U. S. 223	6

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PETITION FOR REHEARING.

Comes now petitioner herein and duly moves the Court to set aside its opinion and judgment herein, rendered on March 2, 1942, and to grant petitioner a rehearing in the cause herein.

As and for its ground for this petition, petitioner respectfully calls the Court's attention to the following material matters of law and fact inadvertently overlooked by the Court, as shown by its opinion in this cause:

I.

The Court has bottomed its decision upon the proposition that the implied permission which petitioner gave the Belleville Bank to carry the note as a real asset was continuing and not revoked, whereas the undisputed evidence adduced at the trial was that petitioner's officers long before the note was ever turned over to respondent by the Belleville Bank, and in fact before the bank was insured, made strenuous efforts to get the notes back, thereby revoking any prior implied permission to the bank to carry the note as a real or live asset (R. pp. 39, 48 and 49). The record shows that the first demand for a return of the note was made in 1930. This evidence is almost identical to that upon which defendant Karnow in **Deitrick v. Greaney, 23 F. Supp., l. c. 759,** and **103 F. (2d) 83,** was released from liability. From this evidence it is clear that any such implied permission had been revoked by action of petitioner.

Furthermore, the Court has failed to apply the additional facts that when respondent insured the bank and **at all times** thereafter respondent knew and was charged with notice that the note (1) was past due, (2) showed on its face that it was in default for nonpayment of interest, and (3) showed on its face that it was non-negotiable. These facts dispel any implied permission to hold out the note as a real asset and, so far as respondent is concerned, put it as well as state banking authorities on notice of all **possible** defenses, including the defense that the note was not real or live paper.

Petitioner further respectfully shows the Court that the footnote 1 in the opinion of the Court, **62 S. Ct., l. c. 678,** is in error in that when the Belleville Bank sold some of the bonds in 1937 for $100 it did not credit the money realized to the note, but instead put the proceeds in a certificate

of deposit payable to itself (the Belleville Bank). It was the respondent which six months after it had taken over the bank's assets, took the proceeds of the certificate of deposit and of its own accord applied that to the interest on the note sued on (R. pp. 20, 22 and 27). Under these facts it seems inconceivable that petitioner should be held to have given an implied permission to the bank, and certainly no one, particularly experienced bank examiners, could look at the note and consider it as a real asset free of any defenses.

II.

The Court, by holding petitioner is estopped to assert its defenses because of a violation of an implication of Section 12 B (y) of the Federal Reserve Act, has failed to apply a fundamental proposition of law that one cannot violate a statute before it comes into being and has further failed to apply the well-established presumption that if a bank continues to be a going concern for even two years after a given date its solvency on such given date must be presumed, absent any showing to the contrary. Andresen v. Karcher, infra. By this test it must be presumed that on January 1, 1934 (when and if a certificate from the state authority was given that the Belleville Bank was solvent), that said bank was in fact solvent because it remained open for more than four years after January 1, 1934, and for more than five years after January 1, 1933. Consequently the genuineness of the note sued on is not germane to the determination of the solvency of the bank on January 1, 1934, because it actually was solvent then and continued as a going concern for more than four years thereafter.

III.

The Court in applying the rule of **Deitrick v. Greaney, 309 U. S. 190, 84 L. ed. 694,** has failed to recognize the exception to the rule announced in that case and has failed to apply the rule of this Court referred to by petitioner in oral argument and announced in **Rankin v. City National Bank, 208 U. S. 541, 52 L. ed. 610,** and in **Deitrick v. Standard Surety & C. Co., 303 U. S. 471, 82 L. ed. 962.** The case at bar falls squarely within the rule in those cases, and in the distinction between **Deitrick v. Greaney** and those cases, as set forth by this Court, **309 U. S., l. c. 199,** where it is said:

> "The Rankin case was tried below and decided here upon the concession of counsel that the transaction was not illegal. * * * Here it is the reach of the statute making respondent's acts illegal and affording protection from them to the creditors which governs our decision."

In the instant case petitioner's act was not illegal so that the case falls squarely within the rule announced in the **Rankin** and **Standard Surety** cases and within the exception in the **Greaney** case. The **Rankin** case was referred to by petitioner in its closing argument before this Court, as was also the case of **Andresen v. Kaercher, 38 F. (2d) 462 (8th Cir.).**

Furthermore, in the opinion delivered in the case at bar, Mr. Justice Douglas stated that the holding in **Deitrick v. Greaney** was "based on the policy of the National Banking Act to prevent the impairment of a bank's capital resources." The facts of our case are, therefore, different than the facts in **Deitrick v. Greaney,** because there funds of the bank were actually paid out to purchase the bank's own stock causing an impairment of its actual assets, whereas here none of the assets of the bank were removed

from the bank by the transaction involved—the bank at all times had in its possession and under its control the same bonds and assets as if the note sued on had not been given and the transaction in no way impaired the bank's capital resources. On these facts the cases are also distinguishable.

Another clear distinction between the cases is that the note in the **Greaney** case gave no one notice that it was subject to defenses, as it was not past due, nor in default, nor non-negotiable. The defense there was asserted on the ground the Receiver stood in the bank's shoes. No one could tell the note there might be subject to any defenses. In the case at bar the note itself on January 1, 1934, and at all times thereafter disclosed it was subject to defenses for the three absolutely sound reasons heretofore stated.

IV.

Mr. Justice Frankfurter, in the opinion written by him and concurred in by the Chief Justice, has, we believe, stated the proper rule that one cannot violate a statute before it comes into being and that Section 12 B (y) of the Federal Reserve Act cannot be stretched to fit this case. In passing it may further be remarked that the statement in the case of **Bank of Slater v. Union Station Bank, 283 Mo. 308**, to which reference is made, does not, it seems to us, make it clear that the decision in **Chicago Title & Trust Co. v. Brady, 165 Mo. 197**, no longer represents the law of Missouri. All the Supreme Court of Missouri said in the **Slater** case with reference to the rule in the **Brady** case was "its soundness may admit of question." The Court did not even say that it **did** admit of question. And the **Brady** decision has subsequently been cited, applied and followed in Missouri by the appellate courts as the law in Missouri. **Eckery v. Byng, 45 S. W. (2d) 924 (Mo. A. 1932)**. That was a suit by the Receiver of the New First

National Bank of Springfield, Missouri. It involved purchase of some of the bank's stock and was a suit on a note given therefor. The case was specifically decided by application of the rule in the **Brady** case, the appellate court referring to it as "a comparatively recent Missouri case." As recently as 1937 the Supreme Court of Missouri in **Farm & Home Savings & Loan Assoc. v. Thiess, 111 S. W. (2d) 189, l. c. 190,** referred to in the **Brady** case and declared its holding to be that "the receiver of an accommodated bank (is) not entitled to enforce obligations evidenced by notes against its accommodation maker," and makes no observation that this **might** not be the Missouri law. The case was held to be inapplicable because in the **Thiess** case it was held there was consideration for the note sued upon. Certainly the rule in Missouri is still the rule in the **Brady** case unless this Court intends to hold that a federal court's interpretation of the Missouri law is to prevail over the interpretation of a Missouri appellate court. This would seem to be squarely inconsistent with the decisions of this Court in **West v. American Telephone, 311 U. S. 223,** and **Stoner v. New York Life, 311 U. S. 464.**

Wherefore, petitioner prays that the Court will set aside its opinion heretofore rendered and grant petitioner a rehearing in the cause herein.

Respectfully submitted,

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Certificate of Counsel

John W. Giesecke and Harold C. Ackert, counsel for the petitioner in the within and foregoing cause, hereby certify that the foregoing petition for rehearing is filed in good faith and not for delay and that said counsel believe the same to be meritorious.

John W. Giesecke,
Harold C. Ackert.

SUPREME COURT OF THE UNITED STATES.

No. 206.—October Term, 1941.

D'Oench, Duhme & Co., Inc., Petitioner, *vs.* Federal Deposit Insurance Corporation. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent instituted this suit in the United States District Court for the Eastern Division of the Eastern District of Missouri on a demand note for $5000 executed by petitioner in 1933 and payable to the Belleville Bank & Trust Co., Belleville, Illinois. Respondent insured that bank January 1, 1934; and it acquired the note in 1938 as part of the collateral securing a loan of over $1,000,000 to the bank, made in connection with the assumption of the latter's deposit liabilities by another bank. Since 1935 the note had been among the charged off assets of the bank. The note was executed by petitioner in renewal of notes which it had executed in 1926. Petitioner who was engaged in the securities business at St. Louis, Missouri, had sold the bank certain bonds which later defaulted. The original notes were executed to enable the bank to carry the notes and not show any past due bonds. Proceeds of the bonds were to be credited on the notes.[1] The receipts for the notes contained the statement, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." Respondent had no knowledge of the existence of the receipts until after demand for payment on the renewal note was made in 1938. Certain interest payments on the notes were made prior to renewal for the purpose of keeping them "as live paper". Petitioner's president who signed the original notes knew that they were executed so that the past due bonds would

[1] The bank sold some of the bonds in 1937 for $100 and credited this amount to interest due on the note. This credit paid interest to May 1, 1933. No later payments were made on the note.

not appear among the assets of the bank, and that the purpose of the interest payments was "to keep the notes alive". The original notes were signed in St. Louis, Missouri, were payable at petitioner's office there, and were delivered to the payee in Illinois. The evidence does not disclose where the note sued upon was signed, though it was dated at Belleville, Illinois, and payable to the bank there.

The main point of controversy here revolves around the question as to what law is applicable. The District Court held that Illinois law was applicable and that petitioner was liable. The Circuit Court of Appeals applied "general law" to determine that the note was an Illinois rather than a Missouri contract; and it decided that under Illinois law respondent was the equivalent of a holder in due course and entitled to recover. 117 F. 2d 491. Petitioner contends that under the rule of *Klaxon Company* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, a federal court sitting in Missouri must apply Missouri's conflict of law rules; that if, as was the case here, Illinois law was not pleaded or proved, a Missouri court would have ascertained Illinois law from Missouri decisions since in such a case Illinois law would be presumed to be the same as the Missouri law; and that the District Court was bound to follow that same course. We granted the petition for certiorari because of the asserted conflict between the decision below and *Klaxon Company* v. *Stentor Electric Mfg. Co., supra.*

We held in the latter decision that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules "would do violence to the principle of uniformity within a state" upon which *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, was based. 313 U. S. at p. 496. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."[2] Sec. 12 B, Federal Reserve Act; 12 U. S. C. § 264(j); 48 Stat. 162, 168, 172; 49 Stat. 684, 692. And see 28 U. S. C. § 42, 43 Stat. 941. Whether the rule of the

[2] That subdivision of the Act further provides: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: *Provided*, That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States." And see S. Rep. No. 1007, 74th Cong., 1st Sess., p. 3.

Klaxon case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of *Deitrick* v. *Greaney*, 309 U. S. 190.

Petitioner in its answer alleged that the note was given without any consideration whatever and with the understanding that no suit would be brought thereon; and that respondent was not a holder in due course. Respondent in its reply alleged that petitioner was estopped to assert those defenses on the grounds that the note was executed for the purpose of permitting the bank to avoid having its records show any past due bonds; that this constituted a misrepresentation which would deceive the creditors of the bank, the state banking authorities and respondent; that petitioner participated in the misrepresentation not only by reason of its knowledge as to the purpose which the note would serve but also by reason of its payment of interest in order to make the notes appear as a good asset. The District Court held that respondent was an innocent holder of the note in good faith and for value and that petitioner was estopped to assert want of consideration as a defense.

Sec. 12B(s) of the Federal Reserve Act, 12 U. S. C. § 264(s) provides that "Whoever, for the purpose of obtaining any loan from the Corporation . . . or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing it to be false, or wilfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." Subdivision (y) of the same section provided, at the time respondent insured the Belleville bank,[3] that such a state bank "with the approval of the authority having supervision" of the bank and on "certification" to respondent "by such authority" that the bank "is in solvent condition" shall "after examination by, and with the approval of" the respondent be entitled to insurance.[4]

[3] These provisions of subdivision (y) were dropped when § 12 B was amended by the Banking Act of 1935. 49 Stat. 684. See S. Rep. No. 1007, 74th Cong., 1st Sess., p. 9.

[4] Subdivision (y) also gave respondent power to prescribe rules and regulations for the further examination of such bank. Though subdivision (y) was revised in 1935, as indicated in note 3, *supra*, subdivision (k)(2) of the amended Act gave respondent's examiners power "to make a thorough exam-

These provisions reveal a federal policy to protect respondent and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans. If petitioner and the bank had arranged to use the note for the express purpose of deceiving respondent on insurance of the bank or on the making of the loan, the case would be on all fours with *Deitrick* v. *Greaney, supra.* In that case the defendant for the purpose of concealing a national bank's acquisition of its own stock had the shares held by a straw man and executed a note to the bank, it being agreed that the shares were to be held for the bank and that he was not to be liable on the note. We held as a matter of federal law, based on the policy of the National Banking Act to prevent the impairment of a bank's capital resources by prohibiting such acquisitions, that the defendant could not rely on his own wrongful act to defeat the obligation of the note as against the receiver of the bank. The defendant's act was itself a violation of the statute. 309 U. S. p. 198. But the reach of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receiver or creditors is not delimited to those instances where he has committed a statutory offense. As indicated by the cases cited in the *Deitrick case* (309 U. S. p. 198) an accommodation maker is not allowed that defense as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements. In some of those cases the accommodation maker was party to the scheme of deception in the sense that he had full knowledge of the intended use of the paper. *Putnam* v. *Chase,* 106 Ore. 440; *Vallely* v. *Devaney,* 49 N. D. 1107; *Nibiack* v. *Farley,* 286 Ill. 536; *Cedar State Bank* v. *Olson,* 116 Kan. 320; *Bay Parkway Nat. Bank* v. *Shalom,* 270 N. Y. 172; *German-American Finance Corp.* v. *Merchants & Mfrs. State Bank,* 177 Minn. 529. In others he had "no positive idea of committing any fraud upon any one." *Denny* v. *Fishter,* 238 Ky. 127, 129; *Iglehart* v. *Todd,* 203 Ind. 427, 442; *Mount Vernon Trust Co.* v. *Bergoff,* 272 N. Y. 192. And see *Pauly* v. *O'Brien,* 69 Fed. 460; Williston on Contracts (Rev. Ed.) § 1632. Yet he has not been

ination of all the affairs" of such banks and in doing so "to administer oaths and to examine and take and preserve the testimony of any of the officers and agents thereof". They were directed to make a "full and detailed report of the condition of the bank to the Corporation." 12 U. S. C. § 264(k)(2).

allowed to escape liability on the note as against the receiver even though he was "very ignorant and ill-informed of the character of the transaction". *Rinaldi* v. *Young*, 92 F. 2d 229, 231. Indeed recovery was allowed by the bank itself in *Mount Vernon Trust Co.* v. *Bergoff, supra,* where the court said (272 N. Y. p. 196): "The defendant may not have intended to deceive any person, but when she executed and delivered to the plaintiff bank an instrument in the form of a note, she was chargeable with knowledge that, for the accommodation of the bank, she was aiding the bank to conceal the actual transaction. Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced."

Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. As we held in the *Deitrick* case (309 U. S, p. 198) it is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the rule. See 7 Zollman, Banks & Banking (1936) § 4783.

Those principles are applicable here because of the federal policy evidenced in this Act to protect respondent, a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans. Those principles call for an affirmance of the judgment below.

Petitioner at the time it executed the renewal note in 1933 did not know that it was to be used to deceive respondent, as the Act creating respondent was not passed until later. But the permission which it gave the bank to carry the note as a real asset was a continuing one and not revoked. That permission must be presumed to have included authority for the bank to treat the note as genuine for purposes of examination at the hands of the public authorities as well as for its general banking activities.

Respondent insured the bank in 1934. The loan was made in 1938 to satisfy respondent's liability to the depositors of the bank under that insurance agreement. Respondent was authorized to insure such a bank only on a certificate from the state authority that the bank was solvent. We assume that such certificate was

given, for to assume otherwise would be to infer that respondent did not discharge its statutory duties. The genuineness of assets ostensibly held by a bank is certainly germane to a determination of solvency. Clearly respondent is a member of the creditor class which the banking authorities were intended to protect. Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the vigilant eyes of the bank examiners. If the bank had wilfully padded the bank's assets with the spurious note in order to obtain insurance from respondent there seems no doubt but that § 12 B(s) would have been violated. Moreover, as we have seen, the inability of an accommodation maker to plead the defense of no consideration does not depend on his commission of a penal offense. The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled. As we have said, petitioner's authority to the bank to use this note was a continuing one. The use to which it was put was not unusual but within the normal scope of banking activities. The fact that the note was charged off by the bank subsequent to the time when respondent insured the bank and prior to the time when it acquired the note under the loan is immaterial. A note may be nonetheless an asset though it is charged off. And respondent is suing here to protect its rights as an insurer, a relationship with the bank which was created prior to the time when the note was charged off. The fact that subsequently respondent learned that the note had been charged off certainly was not notice that the note was spurious. It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine. It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. And it is no more a defense here than it was in the *Deitrick* case that no damage was shown to have resulted from the fraudulent or unlawful act. The federal policy expressed in the Act, like its counterpart in state law, is not dependent on proof of loss or damage caused by the fraudulent practice.

Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was

responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practices should not bar its defense to the note. Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act than were the criminal penalties imposed on the agreement in the *Deitrick* case. If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. The federal policy under this Act of protecting respondent in its various functions against such arrangements is no less clear or emphatic than the federal policy of outlawing purchases by a bank of its own stock involved in the *Deitrick* case. Cf. *Rinaldi* v. *Young, supra; Federal Deposit Ins. Corp.* v. *Woods,* 34 F. Supp. 296.

Affirmed.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case.

Mr. Justice FRANKFURTER.

The CHIEF JUSTICE and I concur in the result on the ground that in the circumstances of this case respondent is entitled to recover, whatever law be deemed controlling. If Illinois law governs, respondent is admittedly entitled to recover as a holder in due course. If Missouri law governs, petitioner is estopped to assert the defenses on which it now relies. Whether the case is governed by the law of one state or the other, or by "federal common law" drawn here from one state or the other, the result is the same.

When the original accommodation notes were executed in 1926, petitioner fully knew that the whole transaction was aimed at giving the bank an appearance of assets where there were none. Petitioner's representative admitted that the bank "suggested that we issue a note to the Bank," which would enable it "to carry this note and not show any past due paper." He had been in the investment security business since 1910; he "knew what the bank meant", and that it was subject to periodic examinations by the state bank examiner, and he assumed the bank did not want past due paper.

On these facts the trial judge held that petitioner is estopped to assert absence of consideration as a defense.

Nothing in Missouri statutes or decisions brought to our notice would warrant us in setting aside this ruling. A case decided in 1901, *Chicago Title & Trust Co.* v. *Brady*, 165 Mo. 197, might have called for a different result. There an accommodation maker was held not estopped to assert absence of consideration as a defense against the bank's receiver, even though he had known that the note was part of a scheme to deceive the state banking authorities by swelling the apparent assets of the bank. But in 1920 the Missouri Supreme Court made it clear that the *Brady* decision can no longer be taken to represent the law of that state. Such is the purport of *Bank of Slater* v. *Union Station Bank*, 283 Mo. 308, 320:

"The facts in this case inevitably suggest the question [of estoppel] we have discussed in this paragraph. Counsel for respondent, however, have not raised it—being deterred, doubtless, by the decision in Title & Trust Co. *v.* Brady, 165 Mo. 197, where a contrary doctrine is countenanced—and we therefore refrain from ruling upon the proposition. We have touched upon it, for the reason that if the Brady case, supra, is considered as announcing 'the Missouri rule' upon this topic, as some commentators have said, that rule is apparently in conflict with numerous and respectable authorities, and its soundness may admit of question."

No subsequent decision was cited, nor have we found any, to show that the court has since reverted to the doctrine of the *Brady* case. It cannot be said, therefore, that in holding petitioner estopped the trial judge departed from Missouri law.

There is no federal statute to override either the Missouri law as to estoppel or the Illinois law which treats respondent as a holder in due course. Were this Court, in the absence of federal legislation, to make its own choice of law, compare *United States* v. *Guaranty Trust Co.*, 293 U. S. 340; *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539; and *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, decided the same day as *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, Illinois or Missouri law would furnish the governing principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Just* v. *Chambers*, 312 U. S. 383, 387.

We are unable to find an estoppel created by federal statute. Reliance is placed upon *Deitrick* v. *Greaney*, 309 U. S. 190. But that case rested on a plain violation of an explicit provision of a federal statute in force at the time of its occurrence. This is

not true here. An accommodation note deposited in a bank before an act of Congress is on the books can hardly become a violation of the act after it is passed merely because the note remains in the bank. One cannot violate a statute before it comes into being. Insofar as the statute may apply to arrangements whereby the Federal Deposit Insurance Corporation might have been misled to its detriment into insuring an insolvent bank, the record is barren of any indication that the $5,000 note in question had any relation to the bank's solvency or to the Corporation's undertaking as an insurer.

The Federal Deposit Insurance Corporation is bringing this suit as pledgee. As to the note sued upon, it is in no different position than would be any other pledgee. Indeed, from the business point of view, its position is less favorable. For it became pledgee only in 1938, three years after the note had been charged off on the books of the bank. The Corporation had since 1934 been making a regular annual examination of the bank's books, which showed this fact; and the schedule of collateral given to respondent when it became pledgee made it perfectly clear that the note had been charged off.

We are not concerned here with liability based on any doctrine of "equitable estoppel" evolved as a principle of federal common law having no statutory roots. For we have put to one side as unnecessary to the disposition of this case, the duty of this Court to make law "interstitially" (as Mr. Justice Holmes put it in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221) in controversies arising in the federal courts outside their diversity jurisdiction.

Of course the policy expressed by the Federal Deposit Insurance Act might be violated, as the National Bank Act was violated in the *Deitrick* case, wholly apart from any question of estoppel or proof of loss to the Corporation. Our difficulty is that the statute cannot be stretched to fit this case. And it seems unnecessary to force such a result when a solution according to settled doctrines is available.

Mr. Justice JACKSON, concurring.

I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or

in the concurring opinion of Mr. Justice FRANKFURTER. That question, as old as the federal judiciary, is met inescapably at the threshold of this case. It is the one which moved us to grant certiorari, and we could not resort to the rule announced without at least a tacit answer to it. The petitioner asserts that the decisions in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, govern this case. If they do, we would not be free to disregard the law of Missouri and Illinois and to apply a doctrine of estoppel actually—but not avowedly—drawn from common-law sources to effectuate the policy we think implicit in federal statutes.

The Rules of Decision Act[1] provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Whether "laws of the several states" as so used included non-statutory law embodied in judicial decisions of state courts was long a subject of controversy. After acting for half a century on the belief that it did, the Court in *Swift* v. *Tyson,* 16 Pet. 1, decided that it did not. Almost a century later that decision with its numerous and sorry progeny was overruled, and the Court answered that it did. *Erie* v. *Tompkins, supra.* It later held that state decisions on conflicts of laws were also binding on the federal courts. *Klaxon* v. *Stentor, supra.* Thus, the Rules of Decision Act as now interpreted requires federal courts to use state law whether declared by the legislature or by the courts as rules of decision "in cases where they apply," except where federal law "shall otherwise require or provide." These recent cases, like *Swift* v. *Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality.[2] The Court has not extended the doctrine of

[1] § 34 of the Judiciary Act of 1789, 28 U. S. C. § 725.

[2] "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." Chief Justice Marshall in Bank of the United States *v.* Deveaux, 5 Cranch 61, 87. See also, Dodge v. Woolsey, 18 How. 331, 354;

Erie v. *Tompkins* beyond diversity cases.[3]

This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions not important here, that: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: . . ."[4] That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, State or Federal."[5]

Burgess v. Seligman, 107 U. S. 20, 34; Lankford v. Platte Iron Works, 235 U. S. 461, 478. But compare Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483.

[3] Its effect even in such cases seems not to have been definitely settled. In an equity case it was said that "the doctrine applies though the question of construction arises not in an action at law, but in a suit in equity." Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 205. That case was in the federal courts by reason of diversity jurisdiction. In a later case in which a suit in equity was brought in federal court to enforce liability under a federal statute the Court said: "The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U. S. C. 725, directing that the 'laws of the several states' 'shall be regarded as rules of decision' in the courts of the United States, applies only to the rules of decision in 'trials at common law' in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. . . . In the circumstances we have no occasion to consider the extent to which the federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies." Russell v. Todd, 309 U. S. 280, 287, 294. In any event, the estoppel here involved seems no more an equity matter than the issue of good-faith purchase involved in Cities Service Oil Co. v. Dunlap, 308 U. S. 208, where state law was held to govern.

[4] Paragraph Fourth of 12 U. S. C. § 264(j) empowers the Corporation "To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: *Provided*, That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States."

In a number of respects and with varying degrees of explicitness the Act elsewhere makes reference to state law. Specific federal criminal sanctions are provided.

[5] A similar provision without more is found in many federal statutes. E. g., 15 U. S. C. § 604 (Reconstruction Finance Corporation); 12 U. S. C. § 24 (National Banks); 12 U. S. C. § 341 (Federal Reserve Banks); 12 U. S. C. § 1432 (Federal Home Loan Banks); 12 U. S. C. § 1716(c)(3) (National Mortgage Associations). This is not to suggest, however, that questions not specifically dealt with in these statutes cannot be federal questions simply because of the absence of an express provision that suits "shall be deemed to arise under the laws of the United States."

Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources.

This issue has a long historical background of legal and political controversy as to the place of the common law in federal jurisprudence.[6] As the matter now stands, it seems settled that the federal courts may not resort to the common law to punish crimes not made punishable by Act of Congress;[7] and that, apart from special statutory or constitutional provision, they are not bound in other fields by English precedents existing at any particular date. The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

I do not understand Justice Brandeis's statement in *Erie* v. *Tompkins*, 304 U. S. 64 at 78, that "There is no federal general

[6] Judicial opinions discussing various aspects of the question include: Wheaton v. Peters, 8 Pet. 591, 658 (1834); Kendall v. United States, 12 Pet. 524, 621 (1838); Smith v. Alabama, 124 U. S. 465, 478 (1888); Bucher v. Cheshire R. R. Co., 125 U. S. 555, 583-584 (1888); Justice Field, dissenting in B. & O. R. R. Co. v. Baugh, 149 U. S. 368, 394-395; Justices Holmes and Pitney, dissenting in Southern Pacific Co. v. Jensen, 244 U. S. 205, 221-222, 230. See also, George Wharton Pepper, The Border Land of Federal and State Decisions (1889); Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell Law Quarterly 499; Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harvard Law Review 49; von Moschzisker, The Common Law and our Federal Jurisprudence, 74 University of Pennsylvania Law Review 109, 270, 367.

[7] The research of Charles Warren, leaned on heavily in Erie v. Tompkins to discredit Swift v. Tyson, led that scholar to conclude that United States v. Hudson, 7 Cranch 32, and United States v. Coolidge, 1 Wheat. 415, establishing the above proposition, were probably wrongly decided. Warren, History of the Federal Judiciary Act of 1789, 37 Harvard Law Review 49, 73. The error, if it be one, comports, however, with the present tendency to constrict the jurisdiction of federal courts, and I think is likely to survive.

common law," to deny that the common law may in proper cases be an aid to or the basis of decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the constitution, treaties, or statutes of the United States [so] require or provide."[8] Indeed, in a case decided on the same day as *Erie* v. *Tompkins*, Justice Brandeis said that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider* v. *La Plata Co.*, 304 U. S. 91, 110.

Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

The contract clause, which prohibits a state from passing any "Law impairing the Obligation of Contracts" is an example of the part the common law must play in our system. This provision is meaningless unless we know what a contract is. The Constitution wisely refrains from saying. We have very recently held upon a long line of authority that in applying this clause we are not bound by the state's views as to whether there is a contract. *Irving Trust Co.* v. *Day*, 314 U. S. —. Take the case where the question is whether a promise made without consideration comes within the protection of the contract clause. Is there any doubt as to where we must go for the answer that we do not find in the Constitution itself? This Court has not hesitated to read the common-law doctrine of consideration into the contract clause, and to restrict the protection of that clause to promises supported by consideration. *Durkee* v. *Board of Liquidation*, 103 U. S. 646, 648; *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 667; *Grand Lodge* v. *New Orleans*, 166 U. S. 143, 146. Compare *Allegheny College* v. *National Chautauqua County Bank*, 246 N. Y. 369.

Other recognitions of our common-law powers abound in the Constitution.[9]

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[8] Similarly, Mr. Justice Holmes's statement that there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" was made with reference to "matters that are not governed by any law of the United States or by any statute of the State." See Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U. S. 518, 533.

[9] Thus, the Judiciary Article provides that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them.[10] Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners* v. *United States*, 308 U. S. 343, 350.

The law which we apply to this case consists of principles of established credit in jurisprudence selected by us because they are appropriate to effectuate the policy of the governing Act. The Corporation was created and financed in part by the United States[11] to bolster the entire banking and credit structure. The Corporation did not simply step into the private shoes of local banks. The purposes sought to be accomplished by it can be ac-

the United States, and Treaties'' made under their authority. It does not give any definition of what are cases in law and equity; it simply assumes the existence of a jurisprudence from which the courts can ascertain the meaning of those terms.

Particularly in the clauses dealing with the rights of the individual, the Constitution uses words and phrases borrowed from the common law, meaningless without that background, and obviously meant to carry their common-law implications. Thus, we find in it the following: ''convicted''; ''Indictment''; ''Treason, Felony, and Breach of the Peace''; ''Piracies and Felonies''; ''Privilege of the Writ of habeas Corpus''; ''Bill of Attainder or ex post facto Law''; ''Bribery''; ''original Jurisdiction''; and ''appellate Jurisdiction; both as to Law and Fact''. In the Bill of Rights Amendments, the necessity for resort to the common law for constitutional interpretation is even more obvious. Here we find: ''unreasonable searches and seizures''; ''Warrants''; ''presentment or indictment of a Grand Jury''; ''due process of law''; ''right to a speedy and public trial by an impartial jury''; ''in Suits at common law''; and ''no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law''.

[10] For example, the common-law doctrines of conflict of laws worked out in a unitary system to deal with conflicts between domestic and truly foreign law may not apply unmodified in conflicts between the laws of states within our federal system which are affected by the full faith and credit or other relevant clause of the Constitution.

[11] 12 U. S. C. § 264(d).

complished only if it may rely on the integrity of banking statements and banking assets. In this case the Corporation attempted to realize on a note that was a part of the assets at the time it insured the bank. It is met by the plea that the note was a sham knowingly given to enable the bank to conceal the worthlessness of certain bonds which it had bought from the maker, a broker. This deception was not for the single day on which the note was delivered; its purpose and its effect was to operate as a continuing inducement to existing creditors and to those who might become creditors to rely on this note as a $5,000 item counting towards its solvency. It may not have contemplated the then unborn Federal Deposit Insurance Corporation as the particular object of its deception, but its purpose was to conceal a loss from then unknown and unidentified persons who might be or become creditors or banking supervisors on behalf of the public. Under the Act the Corporation has a dual relation of creditor or potential creditor and of supervising authority toward insured banks.[12] The immunity of such a corporation from schemes concocted by the cooperative deceit of bank officers and customers is not a question to be answered from considerations of geography. That a particular state happened to have the greatest connection in the conflict of laws sense with the making of the note involved or that the subsequent conduct happened to be chiefly centered there is not enough to make us subservient to the legislative policy or the judicial views of that state.[13]

I concur in the Court's holding because I think that the defense asserted is nowhere admissible against the Corporation and that we need not go to the law of any particular state as our authority for so holding.

I hardly suppose that Congress intended to set us completely adrift from state law with regard to all questions as to which it has not provided a statutory answer. An intention to give persuasive or binding effect to state law has been found to exist in a number of cases similar in that they arose under a law of the United States but were not governed by any specific statu-

[12] 12 U. S. C. § 264(i), (k), (l).

[13] Compare Central Vermont Ry. Co. v. White, 238 U. S. 507; Southern Express Co. v. Byers, 204 U. S. 612; Chesapeake & Ohio Ry. Co. v. Kelly, 241 U. S. 485; Western Union Telegraph Co. v. Boegli, 251 U. S. 315; Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566; Western Union Telegraph Co. v. Priester, 276 U. S. 252; Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44; Local Loan Co. v. Hunt, 292 U. S. 234; Jenkins v. Kurn, 313

tory provision.[14] No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved. But petitioners' conduct here was not intended to confer any right on the bank itself, for as to it the note was agreed to be a nullity. Petitioners' conduct was intended to and did have a direct and independent effect on unknown third parties, among whom the Corporation now appears.[15] The policy of the federal Act does not seem to me to leave dependent on local law the question whether one may plead his own scheme to deceive a bank's creditors and supervising authorities as against the Corporation. Even though federal criminal sanctions might not be applicable to these facts, and even though the doctrine of *Deitrick* v. *Greaney*, 309 U. S. 190, may not fully comprehend the present case, I think we now may borrow a doctrine of estoppel from the same source from which the Court borrowed it in that case, and to reach the same result.

U. S. 256; Royal Indemnity Co. v. United States, 313 U. S. 289; O'Brien v. Western Union Telegraph Co., 113 F. 2d 539.

[14] Campbell v. Haverhill, 155 U. S. 610; McClaine v. Rankin, 197 U. S. 154; Chattanooga Foundry v. Atlanta, 203 U. S. 390; O'Sullivan v. Felix, 233 U. S. 318; Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299; Brown v. United States, 263 U. S. 78; United States v. Guaranty Trust Co., 293 U. S. 340; Board of Commissioners v. United States, 308 U. S. 343; Rawlings v. Ray, 312 U. S. 96; Just v. Chambers, 312 U. S. 383.

[15] The reasons given by the opinion of Mr. Justice Frankfurter for declining to apply the doctrine of equitable estoppel seem inadequate. To insist that the $5,000 note in question does not appear from the record to have had "any relation to the bank's insolvency or the Corporation's undertaking as insurer" is to part company with the realities of the period in question when small banks—and large ones as well—were operating on perilously narrow margins of solvency, if any. To hold that the Corporation is to be judged as a mere private pledgee of a particular piece of paper is to ignore the comprehensive public character of its function. And the wrong to it was sustained when it became committed to insure the bank—not later when as a step to working its way out of loss it took assets already equitably its own as a pledge and put up money for a plan to continue banking facilities to the community. To say that the note had been charged off is to stress the irrelevant. This was admittedly long after the Corporation had become bound as the bank's insurer. It also attributes to the "charge-off" an unwarranted significance. The classification of this paper as inadmissible for a commercial bank would have been justified by its obvious "slow" character, or may have been due to mere lack of information as to the ability of a nonresident debtor to meet it. It is no acknowledgment or notice of a legal defect in the paper.